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The case of France v. State, recently decided by the Supreme Court of Ohio, involves constitutional questions of special interest to medical practitioners. The case involved the validity of an act of the legislature known as the Medical Registration and Examination Law, establishing a State medical board, by which medical practitioners must be licensed and under whose provisions unlicensed practitioners are liable to prosecution and punishment. The principal ground of objection to the act, was that it conferred judicial powers upon ministerial officers and discriminated in favor of resident and against non-resident practitioners. The court, however, was unanimous in upholding the constitutionality of the act. This conclusion is in accord with most of the State courts wherein statutes of a similar character have been attacked.

On another page of this issue we have called attention to the recent opinion of United States Judge Clark, in Nashville, Chattanooga & St. Louis Railway Co. v. McConnell, involving the right of railroad companies to restrain the brokerage in railway tickets. The defendants were ticket scalpers, engaged in buying Tennessee Centennial Exposition tickets from the holders, and in reselling them in violation of the contract contained therein. Acting upon the principle that one who wrongfully interferes in a contract between others, and for the purpose of gain to himself, induces one of the parties to break it, the court held that a continued interference may be ground for an injunction where the resulting injury will be irreparable. It was also held to be no objection to the jurisdiction of a court of equity to grant an injunction, because the enjoined act is also a violation of the criminal law, or that it might properly be made the subject of criminal legislation, which the law-making power has not seen fit to provide. The question involved in this case is new, or, to speak more correctly it is a new application of old principles, and the case will, therefore, attract more than ordinary interest.

That the governor of a State has inherent power, independent of any statute, to revoke his warrant issued for the surrender of an alleged fugitive from justice, at any time before he is taken out of the State, appears from the recent case of State v. Toole (Sheriff), 72 N. W. Rep. 53, decided by the Supreme Court of Minnesota. The court there decided that if in a proceeding in *habeas corpus* on behalf of the alleged fugitive, it appear that the executive warrant has been revoked he must be discharged and the grounds of such revocation cannot be inquired into. The court shows that such authority on the part of governors has been heretofore generally recognized and acted upon; that a number of judicial opinions concur in the position now taken by the Minnesota court; and that the views of the text writers are to the same effect. The principal argument of counsel against the existence of the power of the governor to revoke a warrant once issued was that under the constitution of the United States, in the case of interstate extradition, the duty of the governor to issue a warrant on the production of the requisition in due form is imperative and ministerial, and not discretionary and judicial. The court say as to this that "it is unquestionably true that when a case is presented which is clearly one contemplated by the federal constitution, the governor has no discretion, but it is his imperative duty to issue the warrant. That duty, however, is one of imperfect obligation, for, if the governor refuses to perform it, we know of no power, State or federal, to compel him to do so. But we are not prepared to assent to the proposition that in determining whether a case contemplated by the constitution is presented, the governor upon whom the demand is made is vested with no discretion, even where the papers are on their face sufficient and in due form. We all know as a matter of fact that governors do exercise a discretion in such cases, and if they are satisfied that the demand is made for some ulterior and improper purpose—as, for example, the collection of a private debt—they refuse to issue a warrant. If a governor may exercise such a discretion in regard to issuing the warrant, we do not see why he may not exercise the same discretion in regard to revoking it; and, if he does revoke it, his reasons for so

doing can no more be inquired into than his reasons for refusing to issue it in the first instance. The existence of the power to revoke would seem necessary, in order to prevent great abuses and wrongs. A warrant is, of necessity, almost always issued *ex parte*, and the governor is liable to be imposed upon by those demanding it, or, for some other cause, to issue it improvidently. It would seem that in such cases the same officer who had the exclusive power to issue the warrant should have the power to remedy the wrong by revoking it."

NOTES OF RECENT DECISIONS.

CRIMINAL TRIAL — VIEW BY JURY — CONVERSATION WITH PASSERBY.—The action of a trial court in granting or refusing a view by jury is in most of the States, a matter of discretion with the trial judge. There are some States in which express statutes have been passed recognizing the right to grant a view by the jury. But the authority inherent inheres in the courts, in the investigation of truth, to call in this and other aids and rests in the discretion of the judge in the absence of constitutional or statutory prohibition. In the celebrated trial by Prof. Webster for the murder of Dr. Parkman, the jury was permitted to see the place where the crime was committed (Com. v. Webster, 5 Cush. 295), and this was also done on the trial of Cluverius (Com. v. Cluverius, 81 Va. 787), in both instances there being no statute to authorize it. The accepted modern doctrine is that the jury should be permitted to visit the scene of the *res gestæ* in criminal as well as civil cases, whenever such visit appears to the court important for the elucidation of the evidence, but the visit must be carefully guarded to prevent tampering by or conversation with third parties. In accordance with this doctrine, the Supreme Court of North Carolina, in the recent case of State v. Perry, reversed the lower court for the reason that the jury in making a view interrogated a passerby as to the identity of a house whose distance from the scene of the crime was material, and thus elicited other evidence than that offered on the trial. The court says that while there is a difference between the authorities as to whether or not the prisoner must accompany the jury on their inspection of the premises (Thomp. Trials, §§ 886, 887), all concur that evidence cannot be taken on such occasions; the object being merely to present to the jury the scene more vividly than is possible by the description of witnesses, so that the jury may with a better comprehension apply the evidence of the witnesses, which must be taken only in open court and in the presence of the prisoner. Under the settled practice, showers are appointed by the court to point out the localities, merely, and no more, so the jury may apply the evidence received on the trial. Thomp. Trials, § 914; Bailey, Prac. 228; Archb. Cr. Prac. (6th Eng. Ed.) 407; State v. Lopez, 15 Nev. 407. For a still stronger reason it was error for the jury to receive evidence on this occasion, since in fact it was a view by the jury of the premises not under authority of the court. It ought rather, therefore, to be considered as a charge of misconduct by the jury. There are decisions that the bare fact of the jury having visited the scene of a capital offense, with whose trial they are charged, though made without leave of the court, is not, *per se*, ground for a new trial, but that some prejudice must appear. People v. Hope, 62 Cal. 291. But we are not called upon to pass on that point, as to which authorities conflict, for the interrogation of the passerby was misconduct calculated to prejudice the prisoner. Hayward v. Knapp, 22 Minn. 5; State v. Lopez, 15 Nev. 407; State v. Tilghman, 33 N. C. 513.

INJUNCTION—RESTRAINING BROKERAGE IN RAILWAY TICKETS.—In Nashville, C. & St. L. Ry. Co. v. McConnell, 82 Fed. Rep. 65, before the United States Circuit Court, Middle District of Tennessee, it appeared that the managers of the Tennessee Centennial Exposition at Nashville secured from railroads the issuance of special round-trip tickets to such Exposition at greatly reduced rates. Such tickets were receivable for return transportation over different roads from those issuing them, but were not transferable, providing by their terms that they should be void if presented by person other than the original purchaser, and such purchaser was required to identify himself before validating agents appointed for that purpose at the Exposition. Defendants were ticket brokers or "scalpers" engaged at

Nashville in buying such tickets from the holders, and in reselling the return portions to others for use in violation of the contract contained therein; giving a guaranty of their acceptance for passage, and assisting the purchasers in fraudulently identifying themselves as the original purchasers before the validating agents. It was held that the railroad companies were entitled to injunctions to restrain defendants from carrying on the business of so dealing in such tickets. The court laid down the following propositions applicable to the case: 1st. In such suits the national and State character of the Exposition, its public importance, and the fact that its success is imperiled by the withdrawal of such tickets from sale by some of the roads, and their threatened withdrawal by others, in consequence of the acts of the defendants, are matters proper to be taken into consideration as factors moving the court to some extent to the exercise of its discretionary power to grant an injunction. 2d. In a suit by a railroad company for an injunction to restrain the purchase from passengers of partly-used tickets, non-transferable by their terms, and their resale for use in violation of the contract contained therein, where different brokers are engaged in dealing in the same class of tickets they may be joined as defendants. 3d. In the use of the writ of injunction, courts exercise a sound discretion, governed by recognized principles of equity jurisprudence and regulated by analogy. It is not a fatal objection that the use of the writ for the particular purpose for which it is sought is novel. 4th. A suit by a railroad company to restrain ticket brokers from buying and reselling railroad tickets to be used in violation of the contract contained therein is not based on such contract, but the subject-matter is the illegal use made of the tickets by defendants, not parties thereto, to the injury of the business of the complainant; and hence any remedy provided by the contract itself for its violation is not a bar to the relief sought. 5th. One who wrongfully interferes in a contract between others, and, for the purpose of gain to himself, induces one of the parties to break it, is liable to the party injured thereby; and his continued interference may be ground for an injunction, where the injury resulting will be irreparable. 6th. It is not an objection to the jurisdiction of a court of equity to grant an injunction to protect property rights that the act sought to be enjoined is also a violation of the criminal law, nor that it might properly be made the subject of criminal legislation which the legislature has not seen fit to provide. The following note by United States District Judge Clark which follows his opinion contains a valuable collection of authorities on the points involved in the case:

That tickets with conditions and restrictions like those contained in the Centennial tickets are valid and binding on the purchaser has been often decided. Among many cases, Mosher v. Railway Co., 127 U. S. 390, 8 Sup. Ct. Rep. 1324; Boylan v. Railroad Co., 132 U. S. 146, 10 Sup. Ct. Rep. 50; Drummond v. Southern Pac. Co., 7 Utah, 118, 25 Pac. Rep. 733, and Cody v. Railway Co., 4 Sawy. 114 Fed. Cas. No. 2940, may be cited. Knight v. Railroad Co., 56 Me. 234, and Railroad Co. v. Connell, 112 Ill. 295, are cases holding that through tickets in form of coupons constitute a contract with each company over whose line transportation is called for. See, also, Railroad Co. v. Weaver, 9 Lea, 38.

Injunction—In What Cases a Proper Remedy Restraining Criminal Acts.—Injunction will lie, at the suit of the State, against a corporation, when it is misusing and abusing its corporate franchises and privileges, and is maintaining its property as a nuisance, though its acts also constitute a crime. Columbian Athletic Club v. State, 143 Ind. 98, 49 N. E. Rep. 914, and 2 Am. & Eng. Dec. Eq. 340. And wherever an individual can show a distinct and irreparable injury to himself, apart from the public in general, he may maintain a bill for injunction against the acts complained of, although criminal, and although the party complained of is liable to prosecution for such acts. Such injunction will be granted where the element of irreparable injury exists in the case. Columbian Athletic Club v. State, before cited; Shoe Co. v. Saxey (decided by the Supreme Court of Missouri), 32 S. W. Rep. 1106; *In re* Debs, before referred to—all reported in 2 Am. & Eng. Dec. Eq. 340, 356, 364. In valuable and extended notes to these cases as reported will be found modern cases illustrating the use of the injunction as a preventive remedy, wherever the facts show that the common law affords no adequate remedy for the acts when once accomplished; and it is no objection to the injunction in such cases that the acts are also criminal, as criminal prosecution furnishes no redress for a private injury sustained. See, also, Stamping Co. v. Fellows, 163 Mass. 191, 40 N. E. Rep. 105, and 2 Am. & Eng. Dec. Eq. 599, and note.

Protection of Trade or Business against Fraud.—A lawful business may be protected against fraud by injunction, although not carried on under monopoly of a valid trade-mark. So, if a person is using something to designate his articles, the exclusive right to use which cannot be claimed as a trade-mark, nevertheless, if such person can show to a court of equity that another person is selling an article like his in such way as to induce the public to believe that it is his, and that he is doing this fraudulently, he may have relief by injunction to prevent such piracy. It is a fraud for one person to palm off his manufactures as those of another person, although he commits fraud by the use of names which are not a subject of

trade-mark property. California Fig Syrup Co. v. Frederick Stearns & Co., 43 U. S. App. 234, 20 C. C. A. 22, and 73 Fed. Rep. 812; Salt v. Burnap, 43 U. S. App. 243, 20 C. C. A. 27, and 73 Fed. Rep. 818. Modern cases clearly are to the effect that a lawful business is entitled to protection by injunction against fraud, regardless of any question of trade-mark. Lawrence Manufg. Co. v. Tennessee Manufg. Co., 138 U. S. 537, 11 Sup. Ct. Rep. 396; Coats v. Thread Co., 149 U. S. 562, 13 Sup. Ct. Rep. 966. See, also, Oxley Stave Co. v. Coopers' International Union, 72 Fed. Rep. 695; Wire Co. v. Murray, 80 Fed. Rep. 811; Central Trust Co. of New York v. Citizens' St. R. Co., *Id.* 218. In Blindell v. Hagan, 54 Fed. Rep. 40, affirmed in 6 C. C. A. 86, 56 Fed. Rep. 696, it was decided that jurisdiction of the circuit court to entertain suit to enjoin a combination of persons from interfering with and preventing shipowners from shipping a crew could be maintained on the ground of preventing a multiplicity of suits at law, and because damages at law for interrupting the business and intercepting the profits of pending enterprises and voyages must, in their nature, be conjectural, and not susceptible of certain proof. It was alleged in that case that complainants could not obtain a crew without a restraining order of the court.

Federal and State Courts—When Injunction will be Granted by Federal or State Courts against the Prosecution of Suits in Each Other's Jurisdiction.—In regard to this question, although not specially related to the question of the principal case, the following statement is found in 36 Am. Law Reg. & Rev. (July, 1897), p. 462: "As a general rule, the federal courts will not enjoin the prosecution of a suit in a State court, being prohibited by statute. Rev. St. U. S. § 720; Diggs v. Wolcott (1807), 4 Cranch, 179; Dillon v. Railway Co. (1890), 43 Fed. Rep. 109; Haines v. Carpenter (1875), 91 U. S. 254; Dial v. Reynolds (1877), 96 U. S. 340; The Mamie (1884), 110 U. S. 742, 4 Sup. Ct. Rep. 194. But cases may arise which fall without the statute. Fisk v. Railway Co. (1793), 10 Blatchf. 518, Fed. Cas. No. 4830; French v. Hay (1874), 22 Wall. 250; Railway Co. v. Kuteman (1892), 4 C. C. A. 503, 54 Fed. Rep. 547. So, though a State court generally will not enjoin the prosecution of a suit in a federal court (Riggs v. Johnson Co. (1867), 6 Wall. 166; U. S. v. Keokuk, *Id.* 514; Mead v. Merritt (1831), 2 Paige, 402; Schluyler v. Pelissier (1838), 3 Edw. Ch. 191; Town of Thompson v. Norris (1882), 63 How. Prac. 418), it may do so in a proper case, and punish the offender for contempt if he persists. Hines v. Rawson (1869), 40 Ga. 356." See, also, Simpson v. Ward, 80 Fed. Rep. 561; Holt Co. v. National Life Ins. Co. of Montpelier, *Id.* 686.

Breach of Injunction by Persons not Enjoined or a Party to the Action—Aiding and Abetting—Committal.—In the late case of Seward v. Patterson (1897), 1 Ch. 545, the English court of appeal affirmed the decision of North, J., and held that the court had jurisdiction to commit for contempt a person not included in an injunction or a party to the action, but who nevertheless, knowing of the injunction, aided and abetted defendant in committing a breach thereof. It was said there was a clear distinction between a motion to commit a man for breach of an injunction on the ground that he was bound by the injunction, and a motion to commit a man on the ground that he aided and abetted in the breach of such injunction.

With respect to the use of the injunction and the parties who may be made defendants to the same bill in respect to the same subject-matter, the following cases may be referred to generally: Lembeck v. Nye, (decided May 20, 1890), 47 Ohio St. 336, 24 N. E. Rep. 686; Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co., 40 Fed. Rep. 577; Supply Co. v. McCready, 4 Ban. & A. 588, Fed. Cas. No. 295; Snyder v. Bunnell, 29 Fed. Rep. 47; Wallace v. Holmes, 9 Blatchf. 65 Fed. Cas. No. 17,100; Chemical Works v. Hecker, 2 Ban. & A. 351, Fed. Cas. No. 12,133; Tie Co. v. Simmons, 106 U. S. 89, 1 Sup. Ct. Rep. 52; Tilghman v. Proctor, 102 U. S. 707; Travers v. Beyer, 18 Fed. Rep. 450; Alabastine Co. v. Payne, 27 Fed. Rep. 559; Cuervo v. Jacob Henkell Co., 50 Fed. Rep. 471; Van Mumm v. Frash, 56 Fed. Rep. 830; Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co., 25 C. C. A. 267, 77 Fed. Rep. 288. See, also, *Id.* 65 Fed. Rep. 620; Cooley, Torts, p. 153; 1 Jagg. Torts, § 122; Varick v. Smith, 5 Paige, 137; Emigration Co. v. Guinault, 37 Fed. Rep. 523; Story, Eq. Pl. § 284.

MASTER AND SERVANT—ASSUMPTION OF RISK BY SERVANT—TELEPHONE LINEMAN.—It is held by the Supreme Court of Connecticut, in McGorty v. Southern New England Tel. Co., 38 Atl. Rep. 359, that a lineman in the employ of a telephone company cannot recover for an injury caused by the fall of a pole on which he was at work, notwithstanding a prior statement by the foreman that he had been up the pole, and that it was safe, where plaintiff knew that it was the rule and custom for each lineman to test the pole for himself, and that suitable appliances were at hand for making such test, and for securing the pole in case the lineman doubted its safety. The court said:

The substance of the plaintiff's reasons of appeal is that the court erred in deciding, upon the facts found, that the defendant was not guilty of negligence, and the plaintiff was entitled to recover only nominal damages. In support of this claim, he cites Wilson v. Linen Co., 50 Conn. 469; McElligot v. Randolph, 61 Conn. 157, 22 Atl. Rep. 1094, and other authorities which lay down the general rule of law that it is the duty of employers to use ordinary care to provide for their employees safe places in which to work, and safe appliances with which to perform their work. An examination of the record shows that the principle stated in these cases cannot avail the plaintiff in this action. The particular acts which it is said the defendant negligently failed to perform in order to render the place where the plaintiff was working reasonably safe were the testing of the poles which were being removed, and the supporting of those which were found to be insecure, before the linemen were ordered to work upon them. The complaint avers that it was the duty of the defendant to so inspect and support the poles, and sets forth, as the facts upon which such duty is predicated, "that it was a rule and custom of said defendant company that, whenever an old line of poles was being supplanted by new poles, to have said old poles tested at their bases, for the purpose of ascertaining whether or not they were rotted and unsafe or dangerous in any way for a lineman to climb, for the purpose of removing cross-arms or wires from the same, and in case any of said poles were found to be rotted at the base, to guy the same with wires or ropes, to prevent them from

falling while the linemen were at work upon the same; that said rule and custom was known to the plaintiff, and he supposed and believed that said pole had been properly tested by the defendant company before ordering him to climb the same, and that plaintiff had no knowledge that said pole was rotted and defective at its base; that the defendant wholly failed to test said pole, as had been its custom and rule prior to that time; that said pole was not guyed by wires or ropes in any way; and that the defendant knew, or by the exercise of due care could have known, that said pole was rotted at its base, and that the same was incapable of sustaining any weight upon it." There are no facts stated in the complaint which indicate that any special mechanical skill was required to discover the defect in the pole, or that the linemen, of whom the plaintiff was one, were not competent persons to inspect and test the poles, or that any of the officers or other employees of the defendant possessed superior qualifications or had better means or opportunities than the plaintiff to ascertain whether the condition of the old poles was such as to render it safe for the workmen to climb them. The plaintiff made no examination of the base of the pole which fell. He knew that it was not guyed or supported in any manner. He says that, by the exercise of ordinary care, its decayed condition could have been detected, but that, from his knowledge of the rule and custom of the defendant to inspect and secure the old poles before linemen were sent to work upon them, he believed that this pole had been properly tested and found to be safe, and for that reason made no examination himself. The complaint makes these facts the basis of the defendant's alleged liability.

As the testing and supporting of the old poles, from the nature of the work, might, either by the terms of the contract of employment, or from other facts and circumstances, have been either a duty of the employer or one of the duties of the plaintiff, and as the plaintiff could not, in an action at law, recover compensation for an injury resulting from his own negligent failure to perform a duty which he was employed to perform, it was essential to the plaintiff's case that he should set forth in his complaint the facts showing why this duty devolved upon the defendant, and why the exercise of due care did not require the plaintiff to examine the pole in question. Whether in this case the plaintiff's injury resulted from his own or from the defendant's negligence depended, therefore, upon the truth or falsity of these averments, and the determination of the question of whether it was the rule and custom of the defendant, as alleged, to inspect and secure the old poles before they were climbed by the linemen, or whether it was one of the duties of the linemen to themselves test the poles, and if found unsafe to secure them, became decisive of the plaintiff's alleged right to rely upon his belief that the poles had been tested by the defendant, and found to be safe. These allegations of fact upon which the averments of duty and of negligence upon the part of the defendant depend were contested upon the hearing, and having been decided, as appears by the finding, adversely to the plaintiff, the question of negligence has thus been determined as a question of fact.

The trial court has found that it was not the rule and custom of the defendant to inspect and test the poles, but that it was the rule and custom, in this branch of the work, that "each lineman should look out for his own safety in climbing poles;" that each lineman should inspect and test the poles for himself, and judge of their safety; and that suitable appliances were at hand for testing and securing poles. That the plaintiff knew this rule, and understood that testing and inspecting were a part of his duties, must be presumed from the fact that he was a lineman of 14 years' experience, and in that capacity had formerly been in the employ of the defendant. The finding of the trial court is thus conclusive upon the question of negligence. It shows that the plaintiff, with a knowledge, when he was ordered to climb the pole in question, that it was the duty of no one but himself to decide whether it was safe, and that, if he doubted its safety, he was at liberty to support it by appliances furnished by the defendant for that purpose, chose rather to rely upon the safe appearance of the pole and the assurances of his fellow-workman, and to take the risk of the pole being sound without making a proper examination himself. If the accident occurred from the negligence of any person, it was through the plaintiff's own fault. He was the person employed by the defendant to examine the poles, and see that they were safe to work upon. As he was able to perform both the work of inspecting and climbing, the defendant ought not to be required to employ some other person than the lineman to test the poles.

We have no occasion, upon the facts found, to consider whether the foreman, Phelps, was a fellow-servant of the plaintiff—a question discussed in the briefs of counsel. The accident did not occur from the negligence of Phelps. It is true he directed the plaintiff to climb the pole, and in answer to the latter's inquiry, truthfully said, as might any other lineman who had tested the pole for himself, that he had been up the pole, and expressed his opinion that it was safe. But the plaintiff knew that it was not a part of the duty of the foreman to instruct an experienced lineman as to the safety of a pole he was about to climb; and, from the facts found, we must assume that he knew that notwithstanding that, in obedience to the order of the foreman, he was required to do the work upon the pole, yet he was to rely upon his own judgment in determining whether it was safe to climb it without testing it or supporting it, and that it was his right to secure the pole before climbing it if he doubted its safety. It cannot be laid down as a proposition of law, as seems to be claimed by plaintiff's counsel, that the linemen of telegraph and telephone companies have a right to rely upon the soundness and safety of the poles upon which they are working, and that it is the duty of such companies to inspect and test poles, and support such as are insecure, before permitting their linemen to climb them. Whether it is incumbent upon the master or the servant to perform such a duty is usually a question of fact depending upon the terms of the contract of employment, the servant's knowledge of the hazards of the work in which he is engaged, his ability and opportunity to discover the dangers to which he is exposed and to avoid them, and upon other circumstances. Employers have a right to decide how their work shall be performed, and may employ men to work with dangerous implements and in unsafe places without incurring liability for injuries sustained by workmen who know, or ought to know, the hazards of the service which they have chosen to enter. Hayden v. Manufacturing Co., 29 Conn. 548; Dixon v. Telegraph Co., 68 Fed. Rep. 630; Greene v. Telegraph Co., 72 Fed. Rep. 250; Flood v. Telegraph Co., 131 N. Y. 603, 30 N. E. Rep. 196; Telephone Co. v. Loomis, 87 Tenn. 504, 11 S. W. Rep. 356. In the last named case, which was an action for damages for an injury sustained by the fall of a telephone pole

the trial court charged the jury that "the plaintiff (defendant in error) had a right to assume that the pole upon which he was ordered to work in cutting away the dead wire was safe and suitable, and of sufficient strength to support the wires and cable suspended thereon, together with his weight, and it was not Loomis' duty, when sent to cut away dead wires, to inspect the pole. Upon an appeal from a judgment in favor of Loomis, Judge Snodgrass, in giving the opinion of the supreme court, with reference to the portion of the charge above quoted, said: "The objection to this is twofold: First, it assumes as a matter of fact, and so decides, that Loomis was not the employee who should have served as inspector for the company, which was a disputed question of fact."

BILLS AND NOTES — NOTE TO JOINT PAYEES —TRANSFER OF INTEREST — LIABILITY.—The Supreme Court of Indiana decides in Bond v. Hollaway, 47 N. E. Rep. 838, that an assignment in writing on the back of a note whereby one of two joint payees assigns his interest to his copayee, will operate as a mere transfer of the assignor's interest, and is not such an indorsement as will render him liable as an indorser. The court says:

The only question for our decision is, is the appellee, Holloway, liable as an indorser by reason of his assignment of his interest in the note to his copayee, Saffell? This exact question has never been decided in this State, and, in fact, we are unable to find any authority directly in point. The question, therefore, must be decided on principle. On the part of the appellee it is contended that by his assignment of his interest in the note to Saffell he did not assume the liability of an indorser, and was not chargeable as such. On the contrary, appellant claims that appellee's indorsement of the note was an unqualifie1 one, and that he is liable thereon. Appellant, in his brief, announces two propositions: (1) That the appellee is *prima facie* liable by reason of his indorsement; and (2) that it is a question of fact, and not one of law, whether the appellant's testator was chargeable with notice of limitations or restrictions of appellee's indorsement to Saffell. We are not favored by any argument on behalf of the appellant. Some authorities are cited, but no argument is attempted. In support of their first proposition, counsel for appellant have cited the following cases: Groves v. Ruby, 24 Ind. 418; Russell v. Swan, 16 Mass. 314; Goddard v. Lyman, 14 Pick. 268. In Groves v. Ruby, *supra*, the only question decided which is pertinent here is that one of the two joint payees of a note may assign his interest therein to a third person, and that such assignee, together with the remaining payee of the note, may proceed jointly against the maker to collect. It was there held that by such assignment the equitable interest of the assignee passed to the assignor. No question is presented or discussed touching the liability of the assignor as an indorser. In Russell v. Swan, *supra*, appellee executed a note to Jeffrey & Russell, and they indorsed the note to Joseph Jeffrey, one of the firm, and the only question decided was that such indorsement vested in the indorsee the full title to the note. In Goddard v. Lyman, *supra*, it was held that a negotiable note, payable to three payees jointly, may be legally transferred by an indorsement by two of them to a third payee and a stranger. After careful examination of the authorities cited by the appellant in support of his first proposition, we are constrained to say they are not in point, and have no bearing upon the question at all. As the point for decision is a new one, and of a general commercial interest, we have considered it with much care, with the end in view of reaching a correct conclusion upon principle. The common-law rule was that, where two or more persons, not partners, were the payees in a promissory note, an indorsement by all of them was necessary to pass title. 2 Pars. Bills & N. 4. This rule, however, has been somewhat modified, and it is now the settled law in many jurisdictions that a part of a written contract may be assigned, and such assignment vests in the assignee the assignor's interest in the contract, in equity. Groves v. Ruby, *supra*; Wood v. Wallace, 24 Ind. 226; 2 Story Eq. Jur. § 1044. But it has nowhere been held that such an assignment is an unqualified indorsement, and that the assignor is liable to the holder on his indorsement. On the contrary, it has been held, and, we think, upon sound principle, that, where one of two joint payees of a promissory note assigns to his copayee all of his right, title, and interest therein, such copayee and assignee cannot maintain an action against the assignor on his indorsement. 1 Daniel, Neg. Inst. p. 629, § 701*a*; Carvick v. Vickery, 2 Doug. 653, note; Foster v. Hill, 38 N. H. 526; Chit. Bills, 57. Mr. Daniels bases the doctrine of such assignor not being chargeable as an indorser upon the ground that such assignment only passes an equitable interest in the note. 1 Daniel, Neg. Inst. p. 629, § 701*a*. As such an assignment, therefore, only passes an equitable interest, and the assignor not being liable to his original copayee as an indorser, the interesting question presents itself, upon what principle can such assignor be liable as an indorser to a subsequent assignee of the instrument? It being everywhere held that such an assignment only passes an equitable interest, we think it comes within the meaning of restricted indorsements, under the mercantile law. In the case under consideration, appellee's indorsement was as follows: "Dec. 26, 1890. On the above date I sine over my interest on the within note to Orlando C. Saffell." This, we think, must be held to be merely a transfer of appellee's interest in the note to his copayee, Saffell, and his interest therein was the one-half of the note, and his right of action against the maker alone. Hailey v. Falconer, 32 Ala. 536, is very similar to the case at bar. The indorsement of the payee was as follows: "For value received, this 28th day of February, 1850, I transfer unto John H. Hailey all my right and title in the within note, to be enjoyed in the same manner as may have been by me." The Supreme Court of Alabama, speaking by Rice, C. J., said: "The indorsement here relied upon by the plaintiff is not in the common form, but substantially different therefrom. * * * Any words in an indorsement which clearly demonstrate the intention of the indorser to make it a qualified one will have the effect to make it such. * * * It is well settled that where there are general words alone in an indorsement they shall be taken most strongly against the indorser. But it is a general and reasonable rule that mere general words in an indorsement shall be restrained by other expressions, more limited, in the same instrument, and for the purpose of ascertaining the intent every part and word of the instrument is to be considered." And in the case from which we have just quoted it was held that there could be no recovery upon the indorsement, either at common law or commercial law. See, also, Jackson v. Stackhouse, 1 Cow. 126; Lyman v. Clark, 9 Mass

225; Rich v. Lord, 18 Pick. 325. In Michigan the negotiable character of a promissory note is destroyed by an indorsement by a payee transforming only his right, title, and interest in it to another. Aniba v. Yeomans, 39 Mich. 171. In Vincent v. Horlock, 1 Camp. 442, it was held that the words, "Pay the contents to A," indorsed on the paper, were a mere transfer, so far as they authorized payment to be made to A, and they did not render the writer liable as an indorser. In the case under consideration we think it clearly appears from the language used in the assignment by the appellee that he merely intended to transfer his interest in the note to his copayee, and that such an assignment was not an indorsement which charged him as an indorser of negotiable paper under the rules of commercial law, and that, this fact being patent upon the face of the writing, all subsequent purchasers were chargeable with notice thereof. For the purpose of determining the sufficiency of the complaint, we do not deem it necessary to discuss or decide the second proposition of appellant as above stated, and we decline to do so. Our conclusion, therefore, is that the complaint does not state a cause of action against the appellee, and that there was no error in sustaining a demurrer thereto.

THE SUBMISSION AND ADOPTION OF CONSTITUTIONAL AMENDMENTS.

1. Provisions governing submission of.
2. Entering of, in journals.
3. Executive approval of.
4. Publication of.
5. Amendment to have but one object.
6. Enjoining submission of.
7. Vote necessary to adopt.
8. Declaring result.
9. Time of taking effect.

Amendments to the constitution may, in most of the States, be proposed in either branch of the legislature under such regulations and within such limitations as may be prescribed in the constitution itself. The action of the legislature in proposing amendments is initiatory, not final, and an amendment once submitted derives all its force from the action of the great body of electors, who at the time of the adoption of the constitution, reserved unto themselves the power of revising the fundamental law. It is not the purpose here to discuss the nature of the participation of a legislature in submitting an amendment—whether its action is strictly legislative, or whether it acts in the character and capacity, *quoad hoc*, of a constitutional convention—but simply to bring together the adjudications suggested by the title hereof, and first of the—

1. *Provisions Governing Submission of.*—The legislature, in proposing the submission of an amendment is not acting in the exercise of its ordinary legislative power, and the constitutional requirements regulating the introduction and passage of "bills" or ordinary legislative enactments do not apply. The courts hold that the action of the legislature is to be tested by those other provisions of the constitution providing for the revising, altering and amending of the fundamental law and which are usually entitled "amendments;" that these provisions are *sui generis*, and are not to be construed *in pari materia* with those governing the method of enacting ordinary statutes.[1]

2. *Entering of, in Journals.*—The article of the constitution pointing out the mode specifically by which it shall be amended is mandatory and must be observed. Thus, one of the common requirements is that a proposed amendment "shall be entered in the journals." The courts all agree that this must be done, yet they are hopelessly in conflict in interpreting the meaning of the language, whether the proposed amendment must be entered at length, that is, written out in full in the journal of each house, or whether a mere identifying reference to the title of the proposed amendment, such as is always entered in regard to legislative bills, is sufficient.[2]

3. *Executive Approval of.*—Another question presented to the courts for determination has been whether proposed amendments

[1] Thus, that a proposed amendment may be by joint resolution; that it is unnecessary to pass a formal act or statute, and that the subject of the proposed amendment need not be expressed in the title, in fact that no title is necessary. Hays v. Hays (Idaho, 1897), 47 Pac. Rep. 732; State v. Dahl (N. Dak. 1896), 68 N. W. Rep. 418; Julius v. Callahan (Minn. 1895), 65 N. W. Rep. 267; Nesbit v. People, 19 Colo. 441, 36 Pac. Rep. 221; *In re* Senate File, 25 Neb. 864, 41 N. W. Rep. 981. Nor need the proposed amendment be read on three different days in each house. Edwards v. Lesueur, 132 Mo. 410, 33 S. W. Rep. 1130.

[2] Holding that a mere identifying reference is sufficient, see Prohibitory Amendment Cases, 24 Kan. 700. *In re* Senate File, 25 Neb. 864, 41 N. W. Rep. 981; Worman v. Hagan, 78 Md. 152, 27 Atl. Rep. 616; Thomason v. Ruggles, 69 Cal. 465, 11 Pac. Rep. 20; Oakland Paving Co. v. Tompkins, 72 Cal. 5, 12 Pac. Rep. 801. State v. Herried (S. Dak. 1897), 72 N. W. Rep. 93. That the amendment must be entered at length in the journals, see Koehler v. Hill, 60 Iowa, 543, 14 N. W. Rep. 738; State v. Tufly, 19 Nev. 391, 12 Pac. Rep. 835; Oakland Paving Co. v. Hilton, 69 Cal. 479, 11 Pac. Rep. 3. It should be noted that the decisions in the 69 Cal. 465, 479, cited *infra*, can neither of them be considered as authority. Both decided on the same day but each conflicts with the other. The decision in the 72 Cal. 5, cited *infra*, may be considered as now expressing the California view.

were, like legislative enactments, subject to executive approval or veto. In the leading case of State v. Mason,[3] the amendment submitted was the renewal under certain terms and conditions of the Louisiana Lottery Company's charter. On *mandamus* to compel the secretary of State to make publication of the proposed amendment as by law required, the secretary set up among numerous other objections that the amendment was not legally submitted because vetoed by the governor and that the amendment failed to pass over his veto. The court held that executive approval was unnecessary, that the veto was an idle and vain ceremony, and that the vote cast thereafter to pass the amendment over the veto was manifestly superfluous; and that this was true even though the amendment might contain provisions which were confessedly matters of legislation. The court say: "The veto of an executive officer can only be exercised when his assent is necessary to perfect a law. A proposition to amend the constitution is not a law, and cannot become a law, until adopted by the vote of the people. The people, in their sovereign capacity, acting by units or individuals, amend their constitution just as they did when they adopted it. If the legislature had been authorized and empowered by the people in the organic law to amend the constitution, then, as a part of the law-making power of the government, the governor would necessarily be empowered to approve or to veto the proposed amendment. But the people have reserved to themselves the right of adopting or rejecting a proposed amendment. The sovereignty of the people has its first expression in the convention called to form a constitution for their government. The convention represents the constructive power of the people in the formation of the constitution. It is the assertion of the will of the people in the ordination and institution of government. The power existent in it is not withdrawn, but continually exists in it, and never expires * * * and the legislature in proposing amendments does so just as the convention would do if in session, as the sovereign people would do, recognizing no other authority than themselves."[4]

[3] State *ex rel.* Morris v. Mason, 43 La. Ann. 590, 9 South. Rep. 776.

[4] Concurring opinion of McEnery, J., in State v. Mason, 43 La. Ann. 590, 9 South. Rep. 776, and see

4. *Publication of.*—In making provision for its own amendment the constitution usually requires that the legislature submitting the amendment shall cause the same to be published a certain length of time prior to the election, in which event compliance therewith is mandatory.[5] Where a constitution prescribed publication "for three months next preceding" the election, it was held that publication in the statutes was sufficient.[6]

5. *Amendment to Have But One Object.*—The direction in a constitution requiring separate amendments to be so submitted as to enable the electors to vote on each amendment separately has been construed to mean amendments having different objects and purposes in view, not dependent upon or connected with each other. Tested by this rule, it was held in State v. Timme,[7] that the several propositions embodied in an amendment submitted to the electors changing the sessions of the legislature from annual to biennial sessions and regulating the tenure of office and compensation of members contained but one amendment. And in State v. Mason, *supra*, the proposed amendment was the extension of the Louisiana Lottery Company's charter for twenty-five years in consideration of the payment, quarterly, into the State treasury of the sum of $31,250,000 for the benefit of the public schools, levees, charities, pensions and drainage of the State. It was urged that the proposition contained the subject matter of more than one amendment, in this, that the charter of a company was an independent matter and that the stipulations as to consideration were not germane thereto, but the court held that the conditions of payment and the des-

Cooley's Const. Lim. 40, 41; State *ex rel.* Wineman v. Dahl (N. Dak. 1896), 68 N. W. Rep. 418. And this has been and is the practice of congress. Jameson's Constitutional Conventions (4th Ed.), §§ 556-562.

[5] State *ex rel.* Woods v. Tooker, 15 Mont. 8, 37 Pac. Rep. 840. It should be noted however, that the Montana constitution declares that its provisions are mandatory. But for all that such a provision should be held to be mandatory, see *In re* Constitutional Convention, 14 R. I. 649.

[6] State *ex rel.* v. Torreyson v. Grey, 21 Nev. 378, 32 Pac. Rep. 190. Upon the reasonableness of a legislative regulation requiring publication, see State v. Davis, 20 Nev. 220, 19 Pac. Rep. 894.

[7] State *ex rel.* Hudd v. Timme, 54 Wis. 318, 11 N. W. Rep. 785. With reference to the control of the liquor traffic, see *In re* Senate File, 25 Neb. 864, 41 N. W. Rep. 985. And see State v. Herried (S. Dak. 1897), 73 N. W. Rep. 93, on regulating the control of certain State educational institutions.

tination of the payments were essential to the organization of the company and necessary to its continued corporate existence.

6. *Enjoining Submission of.*—The submission to the electors of a proposed constitutional amendment will not be arrested by the courts. In State v. Thorson,[8] it was sought to enjoin the secretary of state from certifying to the county auditors as a proposed constitutional amendment the joint resolution submitted by the legislature repealing the prohibition article of the constitution. The court held it to be the duty of the secretary to certify the proposed amendment as that was the only means by which the action of the legislature could be communicated to the electors; that under our system of government the electors were alone clothed with the power to modify the organic law and that until they shall have acted the proceeding was incomplete. And in Edwards v. Lesueur,[9] which was a proceeding to restrain the secretary of State from submitting an amendment or the removal of the State capitol, the court said that its power to arrest the submission of an amendment to the people, was coupled with far more serious responsibilities than its right to declare a statute void; that it was a serious question for the courts to come between the people and their authorized and accredited agents, and arrest their will in respect to what the organic law should be.

7. *Vote Necessary to Adopt.*—Where proposed amendments are required to be approved by a majority vote, considerable conflict of opinion exists, due largely to difference in the phraseology of the constitutions, whether a majority voting on the amendment is sufficient, when not a majority voting at the election. In the late case of Green v. Board of Canvassers,[10] which involved the construction of the words "if a majority of the electors shall ratify the same," that is, an amendment extending the equal right of suffrage to women, the court held that the amendment was ratified if it received a majority of all the votes cast upon it, although not a majority of the votes cast at the election, thus affirming the American policy to be that whenever a question is submitted to the decision or action of a majority of the electors, "the meaning is the decision or action of a majority of those persons qualified to vote and who do in fact vote upon the question or proposition submitted, unless some different intention is clearly expressed in the act or instrument providing for the submission, or plainly to be inferred therefrom."[11]

8. *Declaring Result.* — Where a constitutional amendment is submitted at a general election without any special provision for casting or canvassing the votes thereon or promulgating the result, the question has arisen does the failure to so provide render invalid the vote thereon. This point received the very careful consideration of Mr. Justice Brewer in the Prohibitory — Amendment Cases. He held that notwithstanding the silence of the statute, when an amendment was submitted at a "general election," without further words or designation, the entire statutory machinery for a general election was meant to be appropriated for the purpose of voting upon and determining the question submitted; that an election actually held under such circumstances came clearly within the judicial cognizance and that courts would take judicial notice of the ascertained result, stating in conclusion that it was the election and not the canvass that made the change.[12] The action of the governor in proclaiming the adoption of an amendment, where his promulgation is required, is con-

[8] State v. Thorson (S. Dak. 1896), 68 N. W. Rep. 202.

[9] Edwards v. Lesueur, 132 Mo. 410, 33 S. W. Rep. 1130. But see *contra:* Livermore v. Wait, 102 Cal. 113, 36 Pac. Rep. 424.

[10] Green v. Board of Canvassers (Idaho 1897), 47 Pac. Rep. 259, 44 Cent. L. J. 383, and note.

[11] Dixon, Ch. J., in Sanford v. Prentice, 28 Wis. 358, 362, affirming Gillespie v. Palmer, 20 Wis. 544, which involved the interpretation of a similar amendment granting negro suffrage. And to similar effect as the text see Dayton v. City of St. Paul, 22 Minn. 400; State v. Barnes, 3 N. Dak. 319, 55 N. W. Rep. 883. In State *ex rel.* v. Langlie (N. Dak. 1896), 67 N. W. Rep. 958, it was held that "two-thirds of the votes polled" on the relocation of a county seat was sufficient. That the majority of all the votes cast at the election is the true criterion, see State v. Babcock, 17 Neb. 188, 22 N. W. Rep. 372; State v. Foraker, 46 Ohio St. 697, 23 N. E. Rep. 491; Stebbins v. Judge Superior Court (Mich. 1896), 66 N. W. Rep. 594, which was on the sufficiency of the vote cast bonding a municipality. See Cooley's Const. Lim., pp. 42, 748.

[12] Prohibitory Amendment Cases, 24 Kan. 700. And see Lovett v. Ferguson (S. Dak. 1897), 71 N. W. Rep. 765. And to like effect see Hays v. Hays (Idaho, 1897), 47 Pac. Rep. 732; Gillespie v. Palmer, 20 Wis. 544. The Supreme Court of Louisiana in commenting on this point in the Kansas decision in State v. Mason, *infra*, where the omissions complained of in the Kansas case had been supplied, say that "had the test of the amendment been made prior to the election, it is reasonably sure they would have invalidated it."

clusive on all departments of the State government, as well as upon the federal courts.[13]

9. *Time of Taking Effect.*—The question what effect the adoption of an amendment has upon the old order of things, and the time when the amendment goes into operation, in other words, whether an amendment is self-executing or not, is always a question of intention to be determined by the language used and the surrounding circumstances. In the late case of Hays v. Hays,[14] the relator had been appointed county attorney under an amendment adopted at the preceding general election abolishing the office of district attorney for each judicial district and substituting therefor the office of county attorney for each county. On *mandamus* to compel the admission of relator to the use and enjoyment of the office, the court held the amendment to be inoperative because it was provided therein that the county attorney should "perform such duties" as may be prescribed by law," and that until the duties of the office had been "prescribed by law," it was an office without duties and the old district attorney continued in office until the expiration of his term.[15] But in *Re* Advisory Opinion,[16] it was held that a provision in an amendment that the costs and expenses in criminal cases, where the defendant was insolvent or discharged, should be paid by the counties where the crime was committed "under such regulations as shall be prescribed by law," did not postpone the operative effectiveness of the amendment until legislative regulation of the manner in which such payments should be made, but that it became operative, *eo instanti* upon its approval by the people.[17] Where the amendment itself provides that the existing state of things shall continue, of course that controls.[18] The validity of a "franchise act," enacted after the adoption of an amendment prohibiting special or private legislation but before the vote thereon was canvassed or proclamation thereof made, was presented to the court in City of Duluth v. Duluth St. Ry. Co.,[19] and the court held the amendment inoperative until the result had been ascertained by the canvass.

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[13] Worman v. Hagan, 78 Md. 152, 27 Atl. Rep. 616; Smith v. Good, 34 Fed. Rep. 204.

[14] Hays v. Hays (Idaho, 1897), 47 Pac. Rep. 732.

[15] And see Blake v. Board of Commrs. (Idaho, 1897), 47 Pac. Rep. 734.

[16] 17 South. Rep. (Fla. 1895) 410.

[17] And to similar effect, see Chittenden v. Wurster, 43 N. Y. Sup. 1035; Cooley's Const. Lim. p. 75; Seneca Mining Company v. Secretary of State, 82 Mich. 573, 47 N. W. Rep. 25; People v. Supervisors, 100 Ill. 495.

[18] See *In re* Oliverez, 21 Cal. 415; Gillis v. Barnett, 38 Cal. 393; People v. Horton, 59 Barb. 169. In Texas it is expressly provided that an amendment shall not become operative until forty days after the election. Ellis v. City of Cleburne, 35 S. W. Rep. 495.

[19] 60 Minn. 178, 62 N. W. Rep. 267.

MUNICIPAL CORPORATIONS—PONDS—NEGLIGENCE.

CITY OF OMAHA v. BOWMAN.

Supreme Court of Nebraska, Sept. 22, 1897.

A municipal corporation is not liable for the injuries sustained by a person who falls into a pond, which is on private ground and not in dangerous proximity to a public highway.

RYAN, C.: This action was brought in the district court of Douglas county by Fannie E. Bowman, as administratrix of the estate of Albert D. Bowman, for the recovery of damages sustained by the estate of the intestate by reason of his death. The deceased, it was alleged in the petition, was about seven years of age when he was drowned in a pond of water which plaintiff in error negligently had permitted to accumulate, and be and remain in, over, and by the side of Davenport street, in the city of Omaha. There were a verdict and judgment against the city in the sum of $1,000. The accident happened on June 15, 1892. The evidence showed that about six years before the date just named the city had constructed an embankment on Davenport street which interfered with the flowing of water from certain lots abutting on said street. The pond in question was caused by this water. The sidewalk was about seven feet from the water, and quite a distance above the water level. There seems to be no dispute in the evidence that to reach the water from the street it was necessary that a person should cross an intervening strip of private property at least six feet in width. A few days before the date of the accident some boys tore up a part of the sidewalk, and launched it upon the pond. Albert D. Bowman and some juvenile friends took possession of this piece of sidewalk, and were using it for a raft, when young Bowman fell off and was drowned. The mere fact that he was thus drowned was alleged in the petition and admitted in the answer. There was no effort to show whether the deceased reached the pond, as he might have done, by passing from his home, near by, over private property, or by way of the

street. It is not clear from the petition just what acts and omissions on the part of the city are claimed to constitute negligence on its part. There was charged a failure to place a fence or visible boundary between the street and the private property adjoining. In view of the fact that it was not claimed that the child entered the water from the street, this averment has no bearing on the questions under consideration. The following averments seem to have described the negligence principally, if not entirely, relied upon, and we shall therefore quote them at length: "Plaintiff further states that said pond of water was formed by the water that formerly would have run through a ravine at said place, the same being filled over at said place by said city in constructing and filling up Davenport street at said place, which said water was negligently permitted to accumulate and remain as aforesaid; and the natural outlet for said water being closed and filled up by the defendant city of Omaha a long time previous to the said June 15, 1892, by the city filling up the street at said Davenport, near 28th street and thereabouts, where said death occurred, being filled about five feet on the north side and about fifteen feet on the south side of said Davenport street, and thereby filling up and stopping a creek or ravine that was wont theretofore to flow along where said street was filled as aforesaid; and although there is, and has been a long time prior to June 15, 1892, a sewer about two blocks away from the place of said death, yet there was no provision made for the drainage of said water by the city or said Moody and Stockdale (the owners of the private property on which the pond was) from said lots; said water thereby being discharged upon said lots in and over and upon Davenport street as aforesaid, and there negligently confined, and negligently by all of said defendants permitted to remain upon said property." In this connection it was alleged that the pond caused in the manner above described had before June 15, 1892, been dangerous and menacing for many years was very enticing and attractive to children of tender age, many of whom in that locality were in the habit of playing in said pond of water, and that the dangerous, menacing, and enticing condition of the pond had been well known by said Moody and Stockdale and the officers and authorities of the city of Omaha at the time of and before said death.

The defendant in error was permitted to recover upon a theory rather narrower than that above stated, as appears from the following instruction given by the court: "(1) The court charges the jury that if the grade and fill was over and across the ravine, through which, prior to the filling, water from springs and the drainage from the vicinity was accustomed to flow, then it was the duty of the defendant, in making said fill, to provide a passageway for the escape of the water which might reasonably be expected to flow along the course of the ravine." The instruction following that above quoted was in this language: "(2) If by reason of the failure of the defendant, when making the fill in Davenport street, to provide a culvert or other passage for the water naturally flowing in and along the ravine, the pond in question was formed, and you shall so find from the evidence, then that is a fact that you should consider, along with other facts, as hereinafter instructed, in making up your verdict." In the brief for the defendant in error it is insisted that this court in City of Beatrice v. Leary, 45 Neb. 149, 63 N. W. Rep. 370, has recognized the applicability of the principles laid down in the above instructions to the facts in this case. In the case just cited there was involved the question of the liability for the diversion of the water from a water course by the city, it is true, but this liability was for physically damaging the real property of a private person. The rule is general that the city may not divert the flowage of a running stream from real property, or mass its water on such property, without making compensation for such damage as thereby may ensue to the property rights of the property owner. This principle is in no manner, however, connected with or correlative of the proposition contended for, and that is the massing of the water of a flowing stream on private property renders the city liable to one who has no interest in such property for whatever personal damages he may sustain from his own voluntary use of such water. It is also urged that these instructions were correctly given in this case in view of the holding of this court in the case of City of Omaha v. Richards, 49 Neb. 244, 68 N. W. Rep. 528, and in the opinion on the rehearing on the same case, reported in 50 Neb. 804, 70 N. W. Rep. 363. In both the opinions there was enforced the liability of the city for damage caused by the drowning of a child. The negligence of the city consisted in permitting water to collect and remain on a traveled street without any precaution being taken to avoid accidents therefrom to the public. The pond which formed was partly in the street and partly on private property, and it was held that the mere fact that the child had fallen off the improvised raft into the water on the private property did not exonerate the city from the consequences of its negligence. Whether the water was that of a flowing stream, or was the accumulation of surface water, was a question of no importance.

As has already, perhaps, been sufficiently indicated, there is presented in the case at bar the question of the liability of a city for the death of a child from drowning in a pond situated on private property. This child is not shown to have used the street in any way, even for the purpose of reaching the pond in which afterwards he was drowned. This question is connected with or modified by no other, as, for instance, the fact that the city had invited the public to go upon, or even in dangerous proximity to the water. In so far as the facts of this case are disclosed, there

is shown nothing of the acts of the child before its presence on the raft. That fact was merely alleged and admitted by the pleadings. The inducement charged was that the water was enticing to a person of the age of this one. This was a statement of a general proposition, applicable to the attraction of any body of water for boyish nature. In what was the city negligent in its duty towards the public, by passively permitting or actively causing the accumulation of this water on private property? We have already pointed out the fact that we are not considering the property rights of the owner of the lots whereon the pond was formed. There is involved no element of damage resulting from loathsome smells or from dangerous sanitary conditions permitted by the city in violation of its duties in that respect. Simply stated, the fact is that the city—so far as the record shows, without any objection from the owner of the lots—overflowed said lots with water. In respect to the public traveling upon its highways, except as above indicated, the city, with respect to the pond formed in the manner indicated, held the same relations as did the owner of the real property submerged. In Richards v. Connell, 45 Neb. 467, 63 N. W. Rep. 915, these relations, with attendant obligations and liabilities, were fully considered, and it was held that a cause of action could arise in none but one of the following classes of cases: "(1) Cases in which the owner of the land has made or permitted a dangerous excavation or embankment, or the like, so near a public highway as to injure one in the rightful use thereof. * * * (2) Cases in which the defendant has negligently left exposed dangerous machinery likely to attract children, and resulting in their injury. Illustrative of this class, which constitutes a recognized exception to the rule, are the so-called 'Turntable Cases.' (3) Cases where the plaintiff was injured while upon the defendant's premises by invitation of the latter, and where the negligence consists in a failure to keep such premises in a reasonably safe condition." This case has been cited with approval in Peters v. Bowman, 115 Cal. 345, 47 Pac. Rep. 113, 598, in which, as well as in the two opinions of City of Omaha v. Richards, *supra*, the adjudicated cases are reviewed to sustain the proposition above stated. In an opinion on a rehearing of Peters v. Bowman, *supra*, it was pointed out that the principle of the Turntable Cases should not be applied, because a turntable is not only a danger specially created by its owner, but it is a danger differing in kind from those under consideration. "A pond," said Beatty, J., "although artificially created, is in no wise different from those natural ponds and streams which exist everywhere, and which involve the same dangers, and present the same appearance and the same attractions, to children. A turntable can be rendered absolutely safe without destroying or materially impairing its usefulness, by simply locking it. A pond cannot be rendered inaccessible to boys by any ordinary means. Certainly no ordinary fence around the lot upon which a pond is situated would answer the purpose; and therefore, to make it safe, it must either be filled or drained, or, in other words, destroyed. But ponds are always safe, and often necessary, and, where they do not exist naturally, must be created, in order to store water for stock and for domestic purposes, irrigation, etc. Are we to hold that every owner of a pond or reservoir is liable for damages for any child that comes uninvited upon his premises, and happens to fall into the water and drown? If so, then upon the same principle must the owner of a fruit tree be held liable for the death or injury of a child who, attracted by the fruit, climbs into the branches and falls out." Referring back to the three clasess of case described in Richards v. Connell, *supra*, it may be said confidently that this case falls within neither. The intestate, uninvited by the city, on private property, took possession of a fragment of a floating sidewalk, from which, accidentally, he fell into the water. Negligence is a fact to be shown by evidence. Its existence cannot be left to mere conjecture. Kilpatrick v. Richardson, 37 Neb. 731, 56 N. W. Rep. 481; *Id.*, 40 Neb. 478, 58 N. W. Rep. 932; Railroad Co. v. Clark, 39 Neb. 65, 57 N. W. Rep. 545; Railroad Co. v. Leigh (Neb.), 69 N. W. Rep. 111. The negligence pleaded and proved must be the proximate cause of the injury of which complaint is made. Brotherton v. Improvement Co., 48 Neb. 563, 67 N. W. Rep. 479. There was not sufficient evidence to meet the first of the above requirements, and, as to the second, there was not only a failure of proof, but the instruction hereinbefore quoted proceeded upon the theory that the city could be held liable for the injury of a person on a state of facts showing that the injury, if any, was one to the mere property right of an individual not a party to the suit. For the errors indicated the judgment of the district court is reversed. Harrison, J., not sitting.

NOTE.—Municipal corporations are not liable for negligent omissions or commissions by their officers in the performance of duties for which such corporations receive no pecuniary profit, but are imposed on them as mere governmental agencies (Gullickson v. McDonald, 62 Minn. 278; Clark v. Manchester, 62 N. H. 577), such as the acts of its officers of police (Wilmington v. Vandegrift [Del. June, 1893], 29 Atl. Rep. 1047; Brown v. Guyandotte, 34 W. Va. 299), or of its fire department. New York v. Workman, 67 Fed. Rep. 347. They are, however, liable in 3 cases: 1st, for failure to keep their streets, alleys, sidewalks, roads and bridges in repair; 2d, in the discharge of ministerial, or specified duties, which are not discretionary or governmental, assumed in consideration of privileges conferred by their charter, even though there be an absence of special rewards or advantages; 3d, as the private owners of property to the same extent that individuals are liable. Gibson v. Huntington, 38 W. Va. 177. A city can lawfully construct sewers and drains to remove the surface water from its streets without any liability to owners of

private property, though it thereby diverts such water and causes it to flow on adjoining property or increases such flow (Schroeder v. Baraboo, 93 Wis. 95), but beyond this cannot impose a greater servitude on adjoining land as to water. McBride v. Ahron, 12 Ohio C. C. 610. Where, however, it fills up a ravine which carried off the water, it must provide a culvert to carry off such water, and exercise reasonable care in keeping such culvert open. Stoehr v. City, 54 Minn. 549. A city has no right to maintain a nuisance (Valparaiso v. Moffit, 12 Ind. App. 250; Bloomington v. Costello, 65 Ill. App. 407), but is not liable to a party injured on its public streets by a nuisance existing on private property, because it had not abated such nuisance. James v. Harrodsburg, 85 Ky. 191. But a city is liable for damages suffered by any one for its want of ordinary care or skill in carrying out its plans for improving its highways (Willis v. Newbern, 118 N. C. 132), or by its failure to keep the same in repair, or by its negligent discontinuance thereof. Schroeder v. Baraboo, 93 Wis. 95. When a private person is damaged by the system of public improvements, the municipality must pay such damages. Bloomington v. Costello, 65 Ill. App. 407. When a highway is rendered a place of peril from any cause as by imperfection in it, excavation in it, outside of the traveled part, from a declivity in it, or an excavation or a stream of water by its side, or from the vicinity of a track, whereon engines and trains pass, the municipality must do what is reasonable and proper to avert the danger. Plymouth v. Graver, 125 Pa. St. 24; Knowlton v. Pittsfield, 62 N. H. 535. Though the excavations or dangerous agencies are on private property, yet a municipality is bound to protect travelers on its highways by proper appliances from being injured thereby, when from their nearness to such highways they may produce injury to such travelers by misstep or other accidental contact, or unintentional deviation from the road. Biggs v. Huntington, 32 W. Va. 55; Calhoun v. Milan, 64 Mo. App. 398; Clark v. Richmond, 83 Va. 355. Where, however, an opening leading from a street is not unusual, and a railing is not necessary for the reasonable security of the public, the municipality is not bound to protect such opening. Richardson v. Boston, 156 Mass. 145. Ordinarily it is a question for a jury to decide, whether a dangerous place or object is so near a line of travel that travelers will be liable to be injured by it, unless a railing is provided, yet when it is very clear that there is no such probability the judge may direct a verdict for the defendant. Scannel v. Cambridge, 163 Mass. 91. A municipality is not bound to erect barriers on its highways so as to protect one who is traveling outside of such highway. Mulvane v. South Topeka, 45 Kan. 45. To create any liability on the part of the municipality the excavation or dangerous agency causing the injury must substantially adjoin the highway. Clark v. Richmond, 83 Va. 355. Where a horse became frightened and ran into a pond which was 15 feet from the line of the turnpike and 27 feet from the traveled part, it was considered there was no liability for damages, there being nothing to show any danger to travel from the existence of the pond or from the absence of a fence. Horstick v. Dunkle, 145 Pa. St. 220. Where an accident occurred 25 feet from the road, it was held that the absence of a railing was no defect. Hudson v. Marlborough, 154 Mass. 218. A city is not bound to protect a party from falling into a street (Calhoun v. Milan, 64 Mo. App. 398; Dorsett v. Greencastle, 141 Ind. 38), nor to provide means of access from private property to a street. Mulvane v. South Topeka, 45 Kan. 45. When a party for his own convenience unnecessarily deviates from a highway and is injured outside of the highway, a city is not liable, no matter how near the obstruction may be to a street. Biggs v. Huntington, 32 W. Va. 55. When one, even though a child, trespasses on the land of a municipality, without license or invitation but for his own pleasure or curiosity and is hurt, the municipality is not responsible. Clark v. Manchester, 62 N. H. 577. The same rule was adopted where the injury could not occur without first trespassing on another's land. Clark v. Richmond, 83 Va. 355. In one case it was decided, that where the defect complained of was wholly outside of the traveled track or sidewalk used by the public for travel, and not so connected therewith as to endanger such public travel thereon, there could be no recovery, although the same was within the lines of the original survey of the highway. Fitzgerald v. Berlin, 64 Wis. 203. When turntables and other dangerous appliances which have a tendency to attract children and left unprotected and children are injured while playing with them, the owners thereof are held responsible for such injuries. Clark v. Richmond, 83 Va. 355. This is an exceptional ruling, and probably arose from a feeling of humanity, and the fact that it is proper and usually an easy thing to properly secure such articles from working any injury. Peters v. Bowman, 115 Cal. 345. On the other hand ponds are created by nature, can hardly be guarded from boys, are very useful, and in some parts of the country are indispensable. The principal case is well sustained in holding that there is no liability for injuries sustained by men or boys, when trespassing on ponds. Overholt v. Vieths, 93 Mo. 422; Gillespie v. McGowan, 100 Pa. 144; Peters v. Bowman, 115 Cal. 345. In one case a city was held liable for the drowning of a boy in a pond belonging to it, which was situated in the midst of a thickly settled part of the city. Pekin v. McMahon, 154 Ill. 141. While it was admitted, that perhaps the location of the pond in this case might have justified the decision, yet it was asserted that this case stood alone. Peters v. Bowman, 115 Cal. 345.

Causa Proxima Non Remota Spectatur.—It is generally held, that in order to warrant a finding, that negligence, or an act not amounting to wanton wrong, is the proximate cause of the injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of attending circumstances. Railway Co. v. Kellogg, 94 U. S. 469. Where there is no reason to expect it and no knowledge in the person doing the wrongful act, that such a state of facts exists as to render the danger probable, if injury does result to a third person, it is generally considered that the wrongful act is not the proximate cause of the injury, so as to render the wrongdoer liable to an action. Sharp v. Powell, L. R. 7 C. P. 253. It is often difficult to draw the line in such cases, yet the principal case evidently falls within the principle of non-liability.

HUMORS OF THE LAW.

The State of Mississippi,——County. Personally appeared before me, the undersigned, justice of the peace in and for said county, Isaac Reed who, being duly sworn, on oath, doth say, that in the 4th district on the "Meadow" in the county of ——, on the 24th day of February, A. D. 1893, Hence Johnson, at a

fight between Willie Johnson and Perry Council, did say to all "stand back, nobody to touch cousin Willie," at the same time he, Hence Johnson, had an open knife in his hand, plainly visible, and in a threatening manner. Hannibal McNeily had gone to them to take Willie away, but desisted because Hence Johnson had the knife open in his hand, the knife was open when he used the threatening words—afterwards when asked by Hannibal McNeily what he would do to a man if he got into a fight with him, he said "he would cut the guts out of him"—being against the peace and dignity of the State of Mississippi. Sworn to and subscribed before me this 1st day of March, A. D. 1893. (Signed) Isaac Reed.—J. P. On this affidavit the defendant, Hence Johnson, was convicted by the justice of the peace of "carrying concealed weapons," and was compelled to appeal the case to the circuit court, where, of course, the affidavit was quashed.

In one of our courts a few days since, an attorney, having called a witness, asked him the usual preliminary questions:

"What is your age?" Answer. "32 years."

"How long have you lived in Ohio?" Answer. "32 years."

"Where did you come from when you came to Ohio?" ! !

The witness was a little non-plussed, but admitted his ignorance.

It was before an Irish trial justice; the evidence was all in, and the plaintiff's attorney had made a long, eloquent and logical argument. Then the defendant's attorney took the floor. "What are you doing?" asked the justice, as the lawyer began. "Going to present our side of the case." "I don't want to hear both sides argued. It has a tindincy to confuse the coort." So the defendant's lawyer sat down.—*Argonaut.*

POETRY OF THE LAW.

A KISS IN COURT.

A lawyer met a pretty miss
  While he was walking out one day,
And stole from her a honeyed kiss—
  Which was not just the proper way,
At once a case of tort was brought
  Which legal rules could not deny;
The lawyer held no justice ought
  So frail a suit as that to try.
The action when it got in court,
  Met with a jury lenient
And many a quillet and retort
  Day after day on it was spent.
The lawyer claimed no maiden could
  So much rare loveliness display;
A kiss like this he understood
  Was flotsam on the State's highway.
The maiden said her rosy lips
  No easement were for him to use,
Though they all others might eclipse—
  His answer was somewhat abstruse.
And thus progressed the argument
  Concerning kisser and kissee,
When to the jury it was sent,
  Who failed entirley to agree,
But, sent into their room again,
  They gave their voice to the de
And found the girl in fault, for plain
  "Contribu ory negligen ce."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions, and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. ACCIDENT INSURANCE—Classification.—One insured as a book-keeper against accident by a policy classifying as more hazardous the occupation of "hunter or hunting," and providing that if injury occurs "while performing an act pertaining to an occupation classed as more hazardous" than the one under which the policy is issued, "or while engaged in a more hazardous occupation," insured shall be entitled only to such indemnity as the premiums paid would purchase in the class in which such occupation is classed, is not prevented from recovering the indemnity provided for a book-keeper, though shot by discharge of a gun he was carrying while hunting for recreation.—HOLIDAY V. AMERICAN MUT. ACC. ASSN. OF OSHKOSH, WIS., Iowa, 72 N. W. Rep. 448.

2. ADVERSE POSSESSION — Presumption of Grant.—A person in possession of land under a valid deed purporting to convey a fee, and defining boundaries, may perfect his title by seven years' open and adverse possession, without showing that the land was granted by the State of Tennessee or of North Carolina, where time, coupled with possession, has raised a presumption of a grant.—O'DELL V. SWAGGERTY, Tenn., 42 S. W. Rep. 175.

3. APPLICATION OF PAYMENTS — Usury.—The law applies partial payments upon a promissory note infected with usury first to the extinguishment of the lawful interest, and then to the reduction of the principal. Consequently, where such a payment on such a note exceeds in amount the lawful interest due thereon, the excess must, if the debtor so elects, be treated as a *pro tanto* payment of the principal; and a plea setting up such payment is good, though filed more than 12 months after the making of the same.—HASKINS V. BANK OF STATE OF GEORGIA, Ga., 27 S. E. Rep. 985.

4. ASSIGNMENT FOR BENEFIT OF CREDITORS.—One of two sureties on a bond of an insolvent executor, who owed the estate, paid the entire debt, and took mortgage security from the executor, and was to look to the cosurety only for one-half of any loss that might be ultimately sustained: Held, that the cosurety was not a creditor of the executor, and hence the conveyance was not an assignment for the benefit of creditors, on the ground that it was for the benefit of the cosurety, as well as the mortgagee.—F. DOHMEN CO. v. VOGEL, Wis., 72 N. W. Rep. 380.

5. ASSIGNMENTS PENDENTE LITE — Effect.—The assignment *pendente lite* of a chose in action which is the subject of the suit does not form ground for abatement, where the assignor has agreed to continue the suit for the benefit of the assignee.—DROUILHET v. PINCKARD, Tex., 42 S. W. Rep. 135.

6. BANKS AND BANKING — Fraud by Agent — Knowledge.—A bank is presumed to know what its president knows only while he acts within the scope of his agency, and hence it is not imputable with knowledge of his fraudulent intent in drawing a fund from the bank in his private capacity as trustee of the fund, with intent to misappropriate it.—KNOBELOCH v. GERMANIA SAV. BANK, S. Car., 27 S. E. Rep. 962.

7. BILLS AND NOTES—Collateral Security—Public Policy.—A loan by a bank, upon an indorsed note, is not affected by the fact that the lender may have been induced by the maker or indorsers to take a further collateral security, which is forbidden by some rule of public policy.—BOWERY BANK OF NEW YORK v. GERETY, N. Y., 47 N. E. Rep. 793.

8. BILLS AND NOTES — Extension of Payment — Release.—A contract of suretyship being necessarily included in every unqualified indorsement of a negotiable instrument, an agreement by the holder of a promissory note, entered into with the maker, whereby, for value the latter extends the time of payment for a definite period beyond the date of maturity, if made without the consent of the indorser, discharges him, whether he be such for value or not.—TANNER v. GUDE, Ga., 27 S. E. Rep. 938.

9. BILLS AND NOTES — Extension — Usurious Consideration.—An agreement made by the payee of a note with the maker, on the day it matures, but without the knowledge or consent of the surety, to extend time of payment in consideration of usurious interest for the period of extension, which is paid in advance, is valid, and discharges the surety.—NIBLACK v. CHAMPENY, S. Dak., 72 N. W. Rep. 402.

10. BILLS AND NOTES—Fraud.—The maker of notes given in payment of his subscription to a syndicate organized to purchase the assets of a corporation, and used by the syndicate in making the purchase, cannot avoid them for fraudulent representations as to the value of, and the incumbrances on, such assets, where the representations were made by his associates in the syndicate, and the promoters thereof, and not by the vendor.—TRADESMEN'S NAT. BANK v. LOONEY, Tenn., 42 S. W. Rep. 149.

11. BONDS—Official Bonds — Non-compliance with Statute.—Under Comp. Laws, § 1382, declaring that no official bond shall be void for want of compliance with the statute, but shall be valid in law for the matter contained therein, an official bond, voluntarily executed in a penal sum greater than that prescribed by statute, may be enforced to the full amount of its penalty.—STATE v. TAYLOR, S. Dak., 72 N. W. Rep. 407.

12. BUILDING AND LOAN ASSOCIATIONS — Usurious Interest.—Rev. St. § 1391, allowing an action for the collection of double the sum received as usurious interest, is not applicable to a contract made with a Georgia building association, enforceable according to the law of Georgia, which provides "that no fines, interest, or premiums paid on loans in any building and loan association shall be deemed usurious."—TURNER v. INTERSTATE BUILDING & LOAN ASSN., S. Car., 27 S. E. Rep. 947.

13. CERTIORARI — Review of Legislative Act.—The action of a board of supervisors in creating a fire district, pursuant to section 87 of the county law, is a legislative, and not a judicial, act, though required to be based on the presentation of a petition by a certain number of taxpayers, and is not reviewable by *certiorari*.—PEOPLE v. SUPERVISORS OF QUEENS COUNTY, N. Y., 47 N. E. Rep. 790.

14. CHATTEL MORTGAGES — Breach of Condition.—After breach of the conditions of a chattel mortgage, the legal title to the property becomes vested in the mortgagee, subject to the right of the mortgagor to redeem before sale, or to compel an accounting in equity, after sale, for the surplus over the debt.—MARTIN v. JENKINS, S. Car., 27 S. E. Rep. 947.

15. CHATTEL MORTGAGE — Venue — Foreclosure.—An action to foreclose a chattel mortgage is properly brought in the county in which the notes were payable.—OXSHEER v. WATT, Tex., 42 S. W. Rep. 121.

16. CONFLICT OF LAWS—Presumptions—Assignments for Creditors.—A corporation having been appointed cotrustee with a natural person, for an insolvent bank, by an Ohio court, the courts of Indiana will presume that such corporation was competent to act as such cotrustee.—UNION SAV. BANK & TRUST CO. v. INDIANAPOLIS LOUNGE CO., Ind., 47 N. E. Rep. 846.

17. CONSTITUTIONAL LAW—Civil Rights — Restaurant Keepers.—Under Laws 1895, ch. 223, providing that any person who shall deny the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of restaurants and other places of public accommodation or amusement to any person shall be liable in damages to the person aggrieved thereby, the keepers of a restaurant were so liable for the refusal of a waiter to serve a guest solely because he was a colored person, in violation of their express command, as such persons are responsible for the wrongful acts of their servants, within the scope of their employment, though willful, and though they did not at the time sanction or know of or subsequently ratify such unlawful acts.—BRYAN v. ADLER, Wis., 72 N. W. Rep. 368.

18. CONSTITUTIONAL LAW — Trial by Eight Jurors.—The trial of defendant by eight jurors for the crime of larceny, committed before the admission of Utah into Statehood, is not a contravention of the rights guaranteed by section 1 of article 14 of the constitution of the United States, and is due process of law, within the meaning of that constitution.—STATE v. THOMPSON, Utah, 50 Pac. Rep. 409.

19. CONSTITUTIONAL LAW—Vested Rights—Franchise.—A consent, granted by the municipal authorities of a town to a gaslight company, to lay conductors for supplying gas "in and through the public streets and highways of the town," confers a franchise upon such company, of which it cannot be deprived except for cause and by due legal process.—PEOPLE v. DEEHAN, N. Y., 47 N. E. Rep. 787.

20. CONTEMPT—Interference with Property in Custody of Court.—Where a marshal, who had taken goods on a writ of replevin directing him to deliver them to the plaintiff, permitted plaintiff's agents to pack the goods, load them into a car, and procure a shipping receipt and bill of lading therefor, such acts constituted a delivery to the plaintiff, and the goods thereby passed out of the custody of the court, and a sheriff who thereafter levied on them under a writ of attachment issued by a State court was not guilty of contempt of the federal court.—ANIMARIUM CO. v. BRIGHT, U. S. C. C., D. (N. J.), 82 Fed. Rep. 197.

21. CONTRACT—Building Contract — Waiver of Defects.—Under a contract providing that a bidder is to make a job to the "satisfaction" of the owner, who has power to reject all work and materials not the best of the kind specified, and that the work is to be inspected as it goes on, and accepted by the owner before final settlement, such owner waives all defects in

work and materials not rejected at the time of such inspection and during the progress of the work.—LAYCOCK v. MOON, Wis., 72 N. W. Rep. 372.

22. CONTRACTS — Conditional Sales.—Where a person sold to defendant personal property that he had surreptitiously taken possession of from plaintiff under a contract of conditional sale that had been executed, but not delivered, plaintiff may recover the same, though the contract was not filed under Rev. St. § 2317, requiring contracts of conditional sale to be filed to preserve the seller's title against subsequent purchasers, as said section applies to completed contracts only.—OWEN v. LONG, Wis., 72 N. W. Rep. 364.

23. CONTRACT — Conditions Precedent.—A married daughter's parents, anxious that she should be near them, promised their son-in-law that if he would erect a house on land belonging to them, clear the land, and put it in cultivation, he should have it when they were done with it. The son-in-law performed the conditions, and lived on the premises till after his wife's death: Held, that the contract was valid, being either the present transfer of the fee, subject to a life estate, or an agreement for a devise.—ALLBRIGHT v. HANNAH, Iowa, 72 N. W. Rep. 421.

24. CONTRACT—Employment — Breach—Discharge.—Failure of the servant to perform his work in an absolutely skillful and satisfactory manner does not, in the absence of a special contract, authorize his discharge, but only failure to perform it in a reasonably skillful manner.—CRESCENT HORSESHOE & IRON CO. v. EYNON, Va., 27 S. E. Rep. 935.

25. CONTRACT—Pleading and Proof.—Where no commission is fixed in a contract for service for obtaining a purchaser for a mine, there may be a recovery on a *quantum meruit*.—NYHART v. PENNINGTON, Mont., 50 Pac. Rep. 413.

26. CONTRACTS—When Joint and Several.—O and K sold complainant a house and lot and a half interest in a mercantile business then conducted by them as partners. As an inducement for complainant to take such property at the price stipulated in the trade O and K agreed that the clerk they were to hire to offset complainant's services should occupy the house and lot with his family at a rental of five dollars per month, which O and K should pay as a part of his salary: Held, that O and K were jointly and severally bound for all the rent.—TAYLOR v. OVERTON, Tenn., 42 S. W. Rep. 178.

27. CORPORATIONS—Franchises—Assignment. — Franchises of a corporation are assignable under Laws 1883, ch. 221, as amended by Laws 1891, ch. 127, providing that any corporation organized under Rev. St. 1878, ch. 86, or for any of the purposes therein specified, may acquire by assignment and thereafter own, any right, privilege or franchise granted to or conferred on any persons by any law of the State, where such right, privilege, or franchise would be in direct aid of the business for which the corporation so acquiring the same was organized.—STATE v. ANDERSON, Wis., 72 N. W. Rep. 386.

28. CORPORATIONS — Insolvency — Trust Funds. — A business corporation was insolvent when it sold all its assets to H, its secretary and treasurer, in payment of a debt, and he knew its situation, though he was not a director. Before the sale the officers had determined to quit business and sell out because of insolvency and their inability to operate with profit. They determined to sell to H, if possible; and such determination was reached mainly because of his large debt against the corporation, the payment of which was secured by a mortgage on the property of one of his relatives, who was a director, and to save the debt of another director: H knew of such determination, and the reasons for it, and why they preferred to sell to him: Held, that after such determination of the officers to sell, the company's assets constituted a trust fund for creditors, and the sale to H was fraudulent and void as to them.—BROWN v. MORRISTOWN CO-OPERATIVE STOVE CO., Tenn., 42 S. W. Rep. 161.

29. CORPORATIONS — Salary of Officer — Rights of Stockholders.—The payment to an officer of a corporation of a salary in excess of the sum authorized by by-laws of the corporation or resolution of its board of directors, by authority of the majority stockholders, though not unlawful and void, as *ultra vires* the corporation, is unjustifiable and voidable, because not properly authorized, as against any innocent stockholder injured thereby.—BROWN v. DE YOUNG, Ill., 47 N. E. Rep. 863.

30. CORPORATIONS — Subscription to Stock — Conditions.—Where an agreement was that a subscription was not to be binding unless the sum of $80,000 was subscribed "by" July 1st, and such amount was subscribed at a meeting held on the night of July 1st, the condition was performed.—ELIZABETH CITY COTTON MILLS v. DUNSTAN, N. Car., 27 S. E. Rep. 1001.

31. COUNTIES — Employment of Attorneys.—The allowance by county supervisors of the claim for services of attorneys employed by the supervisors to transact business for the county is conclusive on the auditor of the rendition and value of the services.—LAMBERSON v. JEFFERDS, Cal., 50 Pac. Rep. 403.

32. COUNTIES — Limitation of Indebtedness. — Act Cong. approved July 30, 1886, prohibited a territorial county from having an aggregate indebtedness exceeding 4 per cent. of its assessed valuation, and provided that the act should not affect any indebtedness contracted prior to its enactment: Held, that such a county, whose indebtedness exceeded such limit when said act was approved, might thereafter make a 4 per cent. levy upon its assessed valuation, and issue warrants not to exceed such levy in anticipation thereof.—LAWRENCE COUNTY v. MEADE COUNTY, S. Dak., 71 N. W. Rep. 405.

33. CRIMINAL LAW—Homicide—Intent. — Where defendant pleaded self-defense, an instruction that the law presumes that he intended to kill deceased from the fact that he killed him, and that, unless it was shown that his intention was other than his act indicated, "the law would not hold him guiltless," was erroneous, since defendant might have intended to kill, and yet have been guiltless.—PEOPLE v. NEWCOMER, Cal., 50 Pac. Rep. 405.

34. CRIMINAL LAW—Larceny by Deception—"Green Goods."—Where defendants, through representations of their ability to procure counterfeit money, obtained the money of another for the pretended purpose of purchasing for him such counterfeit money therewith, but really intending to deprive him of it by such deception, and to at once appropriate it to their own use they were guilty of larceny, and not of obtaining money under false pretenses, as the title to the money so obtained did not pass.—CRUM v. STATE, Ind., 47 N. E. Rep. 883.

35. CRIMINAL LAW—Manslaughter.—Under an indictment charging that defendant did "deliberately, willfully, and unlawfully kill one D," there may be a conviction of involuntary manslaughter, which is defined by Pen. Code, § 192, as "the unlawful killing of a human being without malice in the commission of an unlawful act not amounting to a felony." — PEOPLE v. PEARNE, Cal., 50 Pac. Rep. 376.

36. CRIMINAL LAW — Murder—Indictment. — Though the indictment only charged murder in the second degree, charging the jury on the first decree would be harmless, the conviction being murder in the second degree. An information charging that defendant "did feloniously, willfully, and of malice aforethought, kill and murder" deceased, being in the form which Rev. St. § 4660, declares sufficient to charge the crime of murder, sufficiently charges murder in the first degree.—FLYNN v. STATE, Wis., 72 N. W. Rep. 373.

37. CONSTITUTIONAL LAW — Peddlers' License.—Act March 12, 1869, requiring persons who peddle or sell at auction in Perry county to take out a local license, though they may have complied with the general laws, but exempting merchants, peddlers who sell only to merchants, and all citizens of the county who peddle

the products of their own growth or manufacture, violates the constitution of the United States by discriminating against citizens residing without the county on the sole ground of their residence.—COMMONWEALTH v. SNYDER, Penn., 38 Atl. Rep. 357.

38. DEED—Conveyance to Wife—Fraud.—The defendant, being indebted to his wife for various loans made to him, evidenced by his two notes, transferred to her the note of a third party for a similar amount, in consideration of the cancellation of his notes: Held to be a valuable consideration, and not in fraud of creditors. —MUIR v. MILLER, Iowa, 72 N. W. Rep. 409.

39. EJECTMENT — Legal Right of Possession under Equitable Title.—Where a partner, who, by the articles of agreement, was vested with sole power to make and sign contracts for the firm, made a contract for the sale of land owned by the firm, which provided that the purchaser should have possession so long as he complied with the contract, and the purchaser took and held possession, and has fully complied with the contract, his right of possession is a legal right, and is available as a defense to an action of ejectment, though his title is equitable.—SCHOOLFIELD v. RHODES, U. S. C. C. of App., Eighth Circuit, 82 Fed. Rep. 153.

40. EQUITY — Inequitable Claim.—Where defendant took title to property purchased in the name of his sister, to defraud his wife, he will not, after the sister's death, be heard to assert that fact in equity, to defeat her title.—TIFFANY v. TIFFANY, Iowa, 72 N. W. Rep. 428.

41. EVIDENCE—Secondary Evidence.—Oral evidence of the contents of a letter was properly excluded, where the person to whom it was addressed was not required to produce it, and the failure to have it in court was not satisfactorily explained.—NEWELL v. CLAPP, Wis., 72 N. W. Rep. 366.

42. EXECUTION SALE—Surplus.—A surplus coming to a debtor under an execution sale is an asset to be reached only by a bill charging a judgment and execution and *nulla bona* return on some of the grounds allowed by law for an attachment, or alleging a fraudulent transfer on the part of defendant, so as to authorize the creation of a lien by the filing of the bill, under Code, § 4288, *et seq.*—CARTER v. WYRICK, Tenn., 42 S. W. Rep. 159.

43. FEDERAL COURTS — Following State Decisions—Powers of State Corporations.—When the highest court of a State has determined the extent of the powers and liabilities of corporations created under its laws, that decision is conclusive in the national courts in all cases involving no question of general or commercial law, and no question of right under the federal constitution.—SIOUX CITY TERMINAL RAILROAD & WAREHOUSE CO. v. TRUST CO. OF NORTH AMERICA, U. S. C. C. of App., Eighth Circuit, 82 Fed. Rep. 124.

44. FEDERAL COURT—Jurisdiction—Mexican Grants. —When both parties claim under Mexican grants, confirmed and patented by the United States in accordance with the provisions of the treaty of Guadalupe Hidalgo, and the controversy is only as to what were the rights thus granted and confirmed, the suit is not one arising under said treaty, so as to confer jurisdiction on a federal court.—CRYSTAL SPRINGS LAND & WATER CO. v. CITY OF LOS ANGELES, U. S. C. C., S. D. (Cal.), 82 Fed. Rep. 114.

45. FRAUDS, STATUTE OF—Part Performance.—In order that the making of improvements may be a sufficient part performance to take a contract for an interest in lands out of the statute of frauds, they must be such as would not have been made except in reliance upon the contract; they must be substantial and permanent in character, and the loss thereof a sacrifice to the purchaser.—COOLEY v. LOBDELL, N. Y., 47 N. E. Rep. 783.

46. FRAUDULENT CONVEYANCES—Exempt Property.— It is not fraudulent to transfer exempt property with intent to remove it beyond the reach of creditors.— SCRIGG v. PAULEY, Ind., 47 N. E. Rep. 821.

47. FRAUDULENT CONVEYANCES — Transactions between Relatives. — An instruction that "transactions between mere relatives, no one else being present, are always viewed with suspicion, and their evidence must be received with many grains of allowance; but, if it is of such a nature as to carry conviction to your minds that said witnesses are telling the truth, then it is entitled to as much weight as that of any other witness," is correct.—MARTIN v. BUFFALOE, N. Car., 27 S. E. Rep. 995.

48. GARNISHMENT — Parties. — Judgment cannot be rendered against one garnished as debtor of two persons, on proof of his indebtedness to one of them. — SIEGEL, COOPER & CO. v. SCHUECK, Ill., 47 N. E. Rep. 855.

49. GUARANTY — Construction of Contract. — A contract of guaranty provided for the payment of any sum "which is now, or at any time hereafter may become due and payable" upon an open account for goods sold and delivered, with the further provision: "This guaranty shall apply to all indebtedness which may accrue at any time within one year from this date, and before the personal service by us upon said (guarantee) of written notice to the effect that we will not be liable for any debt contracted after the service of such notice: Held, that the guaranty was not a continuous one, but was limited to one year.—ROUSS v. CREGLOW, Iowa, 72 N. W. Rep. 429.

50. HOMESTEAD — Evidence — Domicile. — Where a former resident of Tennessee is keeping house with his children in Missouri, has voted there, and has expressed his purpose of never returning to Tennessee, he will be deemed to have established his domicile in Missouri. — MCCLELLAN v. CARROLL, Tenn., 42 S. W. Rep. 185.

51. HUSBAND AND WIFE — Community Property. — Since there is no statute of the territory of New Mexico as to the right of husband and wife to acquest property while both are alive, and the statute adopting the common law as the rule of action and decision does not ascertain such rights, after separation and during the lives of both such rights are governed by the Spanish and Mexican laws in force at the time the territory was acquired by the United States.—BARNETT v. BARNETT, N. Mex., 50 Pac. Rep. 337.

52. HUSBAND AND WIFE—Indebtedness.—A husband, in consideration of money received from his wife's general estate, may create an indebtedness to her by agreeing to repay her, which indebtedness he may subsequently pay by conveying property to the exclusion of other creditors.—SANFORD v. ALLEN, Tenn., 42 S. W. Rep. 183.

53. INSANITY — Lunatic — Contract.—Where a person contracts with a lunatic with knowledge of his disability, and the contract is set aside on that ground, the lunatic can be charged only with such benefits as he actually received.—CREEKMORE v. BAXTER, N. Car., 27 S. E. Rep. 994.

54. INSURANCE — Incumbrances. — Where a policy of fire insurance covering personal property was issued to a partnership, the fact that one member thereof subsequently executed and delivered to another member a mortgage on such property did not constitute such an incumbrance as was contemplated by a stipulation in the policy to the effect that it should be void "if the subject of insurance be personal property, and be or become incumbered by a chattel mortgage."— ALSTON v. PHENIX INS. CO. OF BROOKLYN, Ga., 27 S. E. Rep. 981.

55. INSURANCE — Interest—Action on Policy.—Where a policy of fire insurance was issued to a husband designated generally as "trustee" and another, the former, if his wife was part owner of the property covered by the policy, had such an insurable interest therein as would authorize him, for her benefit, to join with the other person insured in an action upon the policy. Code, § 2795.—SOUTHERN MUT. INS. CO. v. TURNLEY, G 27 S. E. Rep. 975.

56. JUDGMENTS — Equitable Relief — Fraud.—Where a decree or judgment of a court of record is sought to be set aside because procured by fraud, complainant must aver facts showing an intentional contrivance by one or more of the parties to the suit to keep complainant and the court in ignorance of the real facts touching the matter in litigation, whereby a wrong conclusion was reached, and positive injury done to complainant's rights. — SMITH v. MILLER, Tenn., 42 S. W. Rep. 182.

57. JUDGMENTS — Res Judicata. — Though the main question in trespass to try title was one of boundary, and the judgment did not determine it, such failure did not render the judgment inconclusive between the parties in a second suit, where the record of the prior suit conclusively shows that the verdict established that the land claimed in the second suit is within the boundary.—NEW YORK & T. LAND CO. v. VOTAW, Tex., 42 S. W. Rep. 138.

58. JUDGMENT NOTES — Authority to Confess. — The general warrant in a judgment note authorizing a confession and execution of judgment thereon "in any court of record" may be executed in any State in the Union. The fact that a judgment note containing a general warrant to confess judgment waives the benefit of Illinois exemption laws is not sufficient to limit the confession of judgment thereon to the State of Illinois, where the makers were resident merchants of Wisconsin, and were in Illinois merely on a business trip when the note was made.—PIRIE v. CONRAD, Wis., 72 N. W. Rep. 370.

59. LIBEL — Publication by Corporation.—A corporation is not liable for damages resulting from the speaking of false, malicious, or defamatory words by one of its agents, even where, in uttering such words, the speaker was acting for the benefit of the corporation, and within the scope of the duties of the agency, unless it affirmatively appears that the agent was expressly directed or authorized by the corporation to speak the words in question. — BEHRE v. NATIONAL CASH-REGISTER CO., Ga., 27 S. E. Rep. 986.

60. LIBEL — Words not Actionable. — A mercantile agency, under the head of "Record Items," in the Weekly Change Sheet furnished to its subscribers, published the following words: "Atlanta: Maier & Berkele: M. Berkele gives R. E. deeds, $4,100. Jewelry;" meaning thereby that said firm was in the jewelry business, and that the Berkele thereof had conveyed to others real estate to the value of $4,100: Held, that the words were not susceptible of the construction placed on them by an innuendo charging their meaning to be that the conveyance had diminished to that extent the property accessible to creditors of said firm, and were not actionable *per se*. — DUN v. MAIER, U. S. C. C. of App., Fifth Circuit, 82 Fed. Rep. 169.

61. MASTER AND SERVANT—Independent Contractor.—A firm of jobbing carpenters employed by a steamship company to make necessary repairs and alterations in their vessels when in port, and who charged for work by the hour, and lumber by the foot, sent men in charge of a foreman to do the work. Superintendents and captains of the vessels had the right to direct the manner and extent of repairs and alterations to be made: Held, that the men, while so engaged, were the servants of the steamship company, and not of an independent contractor.—ATLANTIC TRANSPORT CO. v. CONEYS, U. S. C. C. of App., Second Circuit, 82 Fed. Rep. 177.

62. MASTER AND SERVANT — Negligence — Ordinary Risks of Employment. — A master of a tugboat who ordered one of the crew to jump ashore to attach a line, is not guilty of negligence if the latter, by reason of his being unaccustomed to jumping, received injuries in attempting to execute the master's order, where it does not appear that the master had knowledge of his inability, since a master of a tugboat is justified in assuming that a member of the crew is accustomed to all ordinary duties required of men on such vessels. — THE PILOT, U. S. D. C., E. D. (Penn.), 82 Fed. Rep. 111.

63. MASTER AND SERVANT—Personal Injuries—Incompetency of Fellow-Servant. — In an action by an employee for personal injuries, the incompetency of the foreman in charge of the work and crew affords no ground of recovery, if it appears that the injuries were caused by the carelessness of another member of the crew in executing the foreman's orders to uncouple cars, but in a manner not directed by the foreman.—CENTRAL R. R. OF NEW JERSEY v. KEEGAN, U. S. C. C. of App., Second Circuit, 82 Fed. Rep. 174.

64. MECHANIC'S LIEN—Materials—Complaint.—A complaint for labor performed and material furnished in the erection of a structure, and for the foreclosure of a mechanic's lien, is sufficient, on demurrer, though it fails to allege specifically what was constructed, where an exhibit attached thereto sets forth the amount of material furnished, and the labor done, and notice of an intention to hold a lien.—PARKER LAND & IMPROVEMENT CO. v. REDDICK, Ind., 47 N. E. Rep. 848.

65. MECHANICS' LIENS — Mines — Superintendent.—A general manager and superintendent of a mine, who does not perform bodily toil, is not entitled to a mechanic's lien upon it, under Comp. Laws, § 1520, giving a lien to one "who performs labor in any mining claim." — BOYLE v. MOUNTAIN KEY MIN. CO., N. MEX., 50 Pac. Rep. 347.

66. MINES AND MINING — Placer Mining. — In placer mining the operator has no right to deposit tailings, etc., in a running stream to such an extent as to cause his neighbor's land to be flooded with them, and thereby to substantially impair its usefulness; and if he does so he is liable in damages, regardless of the question of his negligence, or of the question whether his mine can be operated successfully without such result, or of the question of priority of appropriation of the waters of the stream. — FITZPATRICK v. MONTGOMERY, Mont., 50 Pac. Rep. 416.

67. MINING—Laborers' Liens.—As against the interest of one who unites and operates several claims as one mine, they may, for the purpose of the lien law, be treated as a single claim, and declared on as such.—HAMILTON v. DELHI MIN. CO., Cal., 50 Pac. Rep. 378.

68. MORTGAGES — Estoppel to Deny Validity.—A few days after a corporation had given a mortgage to secure three notes, G, who was a creditor and director, heard of the fact. At a subsequent meeting of stockholders, attended by G, a resolution was unanimously adopted, ordering the directors, by mortgage or otherwise, to liquidate its indebtedness in whole or in part. Afterwards, when the first note became due, and the mortgagee began foreclosure proceedings, four of the nine directors, other than G, with the knowledge and encouragement of G, induced one M to take an assignment of the mortgage to prevent a foreclosure. Under an agreement with the company, G and another director had recently sold a large amount of stock on their representation that it was a good investment: Held, that G was estopped from questioning the validity of such mortgage as against M.—GILLETTE v. MEREDITH, Iowa, 72 N. W. Rep. 443.

69. MORTGAGES — Separate Mortgage of Improvements.—Under Civ. Code Cal. § 2947, providing that "any interest in real property capable of being transferred may be mortgaged," personal property, which by being attached to land by the owner has become a part of the realty, may still be mortgaged separately from the land itself; and such mortgage, when properly recorded, is enforceable against a subsequent purchaser of the realty.—BRODRICK v. KILPATRICK, U. S. C. C., S. D. (Cal.), 82 Fed. Rep. 138.

70. MUNICIPAL CORPORATIONS — Changing Grade of Street.—In an action by the lessee of a ball park for injury to the property caused by a change in the grade of a street, it was error to permit the jury to find a diminution in the value of the leasehold since the change, on the theory that the receipts of the business, which the evidence showed had in fact increased,

would have increased much more but for such change.—PHILADELPHIA BALL CLUB v. CITY OF PHILADELPHIA, Penn., 28 Atl. Rep. 357.

71. MUNICIPAL CORPORATIONS—Salary of Mayor.—Acts 23d Gen. Assem. ch. 16, provides: "That cities incorporated under special charters are hereby granted the power to fix the compensation of their mayors by ordinances of their respective city councils as follows: In cities of over twenty thousand population not to exceed $1,500 per annum, which amount shall be in full compensation of all services of such mayor of every kind and character whatsoever connected with his official duties:" Held, that the act is not self-enforcing, but becomes operative only when the contemplated action is taken by the city council.—STATE v. OLINGER, Iowa, 72 N. W. Rep. 441.

72. NATIONAL BANKS—Liability of Directors for Negligence.—Where the affairs of a national bank were managed entirely by its cashier, who was reputed and universally believed to be honest and capable, but whose dishonesty and reckless management resulted in wrecking the bank, the president and directors, who knew little of the business of banking, and most of whom were farmers, were not guilty of negligence rendering them liable for the losses to creditors because they failed to examine the books; the statements prepared and furnished them by the cashier, and which purported to be made from the books, showing the bank to be in a prosperous condition, and there being no grounds of suspicion known to them.—WARNER v. PENOYER, U. S. C. C., N. D. (N. Y.), 82 Fed. Rep. 181.

73. NATIONAL BANKS—Powers—Seed-Grain Liens.—The national banking laws do not prevent a national bank from selling on credit grain owned by it, and acquiring a seed-grain lien for the price, under a State statute.—FIRST NAT. BANK OF PARKER v. PEAVY ELEVATOR CO., S. Dak., 72 N. W. Rep. 402.

74. NEGLIGENCE — Vicious Animal — Knowledge of Owner.—Knowledge of servants, put in charge of a bull to drive him to a certain place, that he is vicious, is knowledge of the owner, so as to make him liable to a stranger injured by him.—CLOWDIS v. FRESNO FLUME & IRRIGATION CO., Cal., 50 Pac. Rep. 378.

75. PARENT AND CHILD—Habeas Corpus—Custody of Child.—A parent has no absolute right to custody of his minor child, and controversy therefor between the parent and a third person should be decided with regard alone to the best interests of the child.—SCHLEUTER v. CANATSY, Ind., 47 N. E. Rep. 825.

76. PARTITION — Res Judicata — Collateral Attack.—Decree in partition cannot be collaterally attacked by a party because she was mistaken in her legal rights in part of the property involved in the suit.—IRVIN v. BUCKLES, Ind., 47 N. E. Rep. 822.

77. PARTNERSHIP—Attaching and Execution Creditors—An attaching creditor, taking advantage of Laws 1894, pp. 42, 43, permitting such to become coplaintiffs with prior attaching creditors, and share with them *pro rata* out of the attached property, is thereby estopped to claim a prior lien against the prior attaching creditor on the ground that defendants are a partnership, and that his claim is against them individually.—ROUSS v. WALLACE, Colo., 50 Pac. Rep. 866.

78. PAYMENT—Evidence—Payment or Purchase.—The senior member of a banking firm was the vice-president and active officer of a waterworks company, between which and the bank there was a running account. The bank, which was in the habit of advancing money for the company and paying its drafts, took up the maturing coupons from bonds of the company; punching the coupons as paid, and charging the amount, together with a commission for making the payment, to the company. The result being a large debit balance against the company on its books, the bank took the unsecured notes of the company for the amount: Held, that such transaction was a payment, and not a purchase of the coupons by the bank.—UNITED WATERWORKS CO. v. FARMERS' LOAN & TRUST CO., U. S. C. C. of App., Eighth Circuit, 82 Fed. Rep. 144.

79. PAYMENT — Pleading.—Where plaintiff alleges an assignment of a note to defendant, who agreed to pay the amount thereof, when collected, to plaintiff, and that it was collected, defendant may prove that he took the note to apply on a debt due him from plaintiff, without a special plea of payment, as such evidence would show that the debt sued upon never existed.—CRADDOCK v. GODDING, Colo., 50 Pac. Rep. 869.

80. PAYMENT—Worthless Checks—Burden of Proof.—A debtor indorsing a check of another to his creditor does not thereby pay his debt, if the check proves to be worthless, unless the creditor agrees that the check shall operate as a payment.—COX v. HAYES, Ind., 47 N. E. Rep. 844.

81. PRINCIPAL AND AGENT—Loan to Agent — Liability of Principal.—In an action to recover money loaned to defendant's agent for use in defendant's business during his absence, a question asked defendant, whether he made any attempt to discover what became of his money and goods during his absence, was not objectionable as calling for hearsay evidence.—MCDERMOTT v. JACKSON, Wis., 72 N. W. Rep. 375.

82. PRINCIPAL AND AGENT — Ratification of Agent's Act.—Where an agent, with written power merely to receipt for money due his principal, settles a claim with one who knows the terms of such power, but, relying on the agent's representations that he has authority to make the settlement, pays money thereon in good faith, the principal, by accepting and retaining the money, with full knowledge of what has been done, ratifies the settlement.—NATIONAL IMP. & CONST. CO. v. MAIKEN, Iowa, 72 N. W. Rep. 431.

83. PRINCIPAL AND SURETY—Contract—Construction.—A contract of suretyship entered into on behalf of a partnership continues no longer than the partnership itself, and sureties for a firm acting as such in the capacity of agents are not liable for money collected and unaccounted for by one of the members of the firm, after the other has retired therefrom, and ceased to participate in the business for the transaction of which such agency was created.—LONDON & L. FIRE INS. CO. v. HOLT, S. Dak., 72 N. W. Rep. 403.

84. RAILROADS—Right of Way—Reversion.—The interest in a railroad right of way is the same whether granted or condemned. The nature and quality of the interest taken and conferred in a railroad right of way is fixed by the legislature, and whether only an easement or a full fee title is purely for its determination. It is therefore competent for the legislature to say to whom the land shall revert when abandoned by the company.—SMITH v. HALL, Iowa, 72 N. W. Rep. 427.

85. RAILROAD COMPANY—Negligence.—Where a traveler on a highway was injured at a railroad crossing, an instruction that the "negligence on the part of the plaintiff which would preclude him from recovery, if there was negligence both upon his part and upon the part of the company, is not the least degree of fault or negligence, but it must be such a degree as to amount to a want of ordinary care on his part," was not erroneous, as leading to the application of the doctrine of comparative negligence.—TEXAS & N. O. RY. CO. v. CARR, Tex., 42 S. W. Rep. 126.

86. RAILROAD COMPANY — Street Railroads — Negligence.—In the absence of proof that either of two street railway companies had any right, by usage or otherwise, of precedence at the intersection of their roads, the law presumes that they stood on a footing of equality, each owing to the other the duty of exercising reasonable care.—METROPOLITAN ST. RY. CO. v. KENNEDY, U. S. C. C. of App., Second Circuit, 82 Fed. Rep. 158.

87. RAILROAD MORTGAGES.—Merger—Foreclosure.—One who, as attorney for a railroad company, the promoter of which was H, negotiated a contract with an investment company of which H was president and chief stockholder, by which the investment company

was to construct the railroad, and receive for each mile thereof a certain amount of the stock and mortgage bonds of the railroad, cannot, as a creditor of the railroad, having known all the facts, insist on a merger of the bonds and stock in the hands of H, who acquired them through the investment company.—TEN EYCK v. PONTIAC, O. & P. A. R. CO., Mich., 72 N. W. Rep. 362.

88. REAL ESTATE BROKERS—Authority to Find Purchaser.—A letter to a real estate broker, who had tendered his services in the sale of a lease, stating that the owner of the lease would not sell for less than a specified sum, and that the broker might retain all above that amount, is merely an authority to find a purchaser, and does not empower the broker to execute a contract for the sale of the lease.—CAMPBELL v. GALLOWAY, Ind., 47 N. E. Rep. 818.

89. REFORMATION OF NOTE—Mistake.—It is sufficient evidence of mistake to warrant reformation of purchase-money, notes and mortgage made to the wife of K, that the consideration therefor was individual property of K; that the papers, when completed, were delivered to him; that he retained them, and received all payments on the notes for years, without objection, till after the wife died; and that the maker of the notes and mortgage testified that the agreement was that the papers should be made out so that, if K died before his wife, she would be the sole owner thereof, and if she died first, he would be the sole owner, and that the scrivener was so directed to draw them, but that they were signed in the presence of K and his wife without being read by or to him.—KROPP v. KROPP, Wis., 72 N. W. Rep. 381.

90. RES JUDICATA.—A judgment that defendants had committed no trespass on the land in controversy, and that plaintiff had shown no such possession as entitled him to maintain an action to quiet title, did not determine the question of title, and is not a bar to an action of ejectment by plaintiff.—RICE v. WEST, Ky., 42 S. W. Rep. 116.

91. SALE—Fraud—Evidence.—Where plaintiff alleges fraud in the sale of hogs that he purchased out of a drove from defendants, their statements as to the soundness of the hogs in the drove, made to other prospective purchasers, are admissible in evidence to show their intent in making representations of soundness to plaintiff. — ZIMMERMAN v. BRANNON, Iowa, 72 N. W. Rep. 439.

92. SALES—Future Delivery—Validity.—Rev. St. 1893, §§ 1859, 1860, provide that contracts for the sale of cotton for future delivery are void unless it is affirmatively shown that at the time of the contract the seller was the owner or assignee of the cotton (or authorized agent of the owner or assignee), or that at the time of the contract it was the *bona fide* intention of both parties that the cotton should be actually delivered and received: Held, that proof that cotton bought for future delivery was actually delivered was not a sufficient showing to meet the above requirements.—RIORDAN v. DOTY, S. Car., 27 S. E. Rep. 939.

93. SLANDER — Publication. — Publication being an essential element in an action for oral slander, the burden of proof is on plaintiff to establish that a third person heard the language spoken, and understood it. —MCGEEVER v. KENNEDY, Ky., 42 S. W. Rep. 114.

94. TAXATION—Priority of Lien.—A specific lien upon personal property, acquired by attachment in an action at law, cannot be displaced in favor of a subsequent claim for taxes on the same property, where no specific lien has been acquired by warrant, or any legal process for the collection of the tax.—WISE v. L. & C. WISE CO., N. Y., 47 N. E. Rep. 788.

95. TRIAL — Excessive Damages — Remittitur. — The statute has not changed the common-law rule that an excessive verdict might be cured by a *remittitur*, except in so far as to entirely vitiate such a verdict when it is made to appear that it is the result of the jury's passion or prejudice. — WAINWRIGHT v. SATTERFIELD, Neb., 72 N. W. Rep. 359.

96. TRIAL — Master and Servant — Personal Injury — Contributory Negligence. — A brakeman cannot recover for injuries received, while coupling two Pennsylvania freight cars, by being caught between the projecting deadwoods with which such cars are constructed, on the alleged ground that it was dark, and the oil furnished him for his lantern was of such poor quality that he was unable to see that the car he was approaching was a Pennsylvania car, when it appears from his own testimony that he must have known that the moving car was a Pennsylvania car, and that he could see the drawhead of the standing car as he approached, and that the coupling pin was in proper position, but that he did not notice the kind of car it was.—VANY v. PEIRCE, U. S. C. C. of App., Sixth Circuit, 82 Fed. Rep. 162.

97. TRUST—Implied Trusts — Limitations.—Where D, in violation of his trust to hold the legal title to land in his name till a sale thereof, and then to divide the proceeds between N and R, deeded the property, against the protest of N, to S, who knew of the trust, and to whom D had executed a trust deed of all his property, S became an involuntary trustee, on acceptance of the D deed, of the property therein embraced, so that the statute of limitations then began to run against an action by N against S on account thereof; and the recognition by S of the rights of N, not being by writing, could not change his position to that of an express trustee.—NOUGUES v. NEWLANDS, Cal., 50 Pac. 386.

98. VENDOR AND VENDEE — Breach of Warranty. — A vendee holding under an executed contract of sale is not entitled to an abatement of the purchase price for breach of the covenants of warranty, unless he repels the presumption that at the time of the sale he knew of the defect, and intended to assume the risk.—ELDER v. FIRST NAT. BANK OF GALVESTON, Tex., 42 S. W. Rep. 124.

99. VENDOR'S LIEN — Priorities. — The priority of a vendor's lien over a subsequent mechanic's lien for work done on the land with knowledge of the vendor's claim is not affected by the latter's non-compliance with Code Civ. Proc. § 1192, requiring a person having or claiming an interest in land on which an improvement is to be erected to give notice that he will not be responsible for the cost of the same. — KUSCHEL v. HUNTER, Cal., 50 Pac. Rep. 397.

100. WATERS — Surface Waters. — Const. art. 1, § 14, prohibiting the damaging of private property for public use without compensation first made, prevents the legislature from authorizing the construction of channels, for the benefit of a certain district, to collect surface water, and take it where it will injure other property not compensated therefor. — RUDEL v. LOS ANGELES COUNTY, Cal., 50 Pac. Rep. 400.

101. WILL—Lost Wills - Contents—Evidence.—A will properly executed and probated will continue in full force, though the original is lost and the copy thereof in the probate court is incomplete and incorrect, through the negligence or fraud of the clerk.—MCNEELY v. PEARSON, Tenn., 42 S. W. Rep. 165.

102. WILLS—Revocation. — A will made by a married woman is not revoked by her subsequently becoming a widow, and marrying a second husband.—IN RE MCLARNEY'S ESTATE, N. Y., 47 N. E. Rep. 817.

103. WILLS — Testamentary Powers. — The testator gave an express power to sell his unimproved and unproductive real estate, and no express power to sell his improved real estate; but in order to carry out the specific directions of the will it was necessary to divide the real estate into eight equal parts, and the improved real estate consisted of thirteen parcels, one of which was of greater value than one-third of his whole estate: Held, that there was an implied power in the executors to sell such of the improved real estate as might be necessary in carrying out, under the direction of the court, an equitable plan of division.—CORSE v. CHAPMAN, N. Y., 47 N. E. Rep. 812.